

**Appendix E:      Committee materials relating to this topic**

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

## M E M O R A N D U M

**TO:** Standard Jury Instructions (Civil) Committee  
**FROM:** Rebecca Mercier Vargas  
**DATE:** October 8, 2012  
**RE:** Products Liability Subcommittee Report

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As background, the Supreme Court issued the corrected decision on our products liability report on May 18, 2012. In a letter from Clerk of Court Tom Hall dated June 4, 2012, the Court asked this committee to consider its products decision. The decision preliminarily approved several of the products instructions as revised in the appendix to the decision. The Court explained these “approvals are only preliminary because this group of instructions must be viewed as a full package before authorization can be provided.” (Op. at 5-6). The Court asked the committee to reconsider several of the products instructions:

403.7 Strict Liability,  
403.11 Inference of Product Defect or Negligence,  
403.13 Preliminary Issue,  
403.14 Burden of Proof on Preliminary Issue,  
403.16 Issues on Crashworthiness and “Enhanced Injury” Claims,  
Model Instruction 7, and  
Special Verdict Form.

In addition, the Court asked the committee to review all of the products instructions to make sure they are consistent with two Supreme Court decisions amending the civil jury instructions: (1) the book reorganization decision; and (2) the electronic devices decision. Both of these decisions issued after the committee submitted its original products liability report in July 2009.

The referral letter asked our committee to file a new report with the Court by November 19, 2012. During our July meeting, the committee discussed the procedure and timing of our response. The committee decided to ask the Court for an extension of time so that we can follow our usual procedure of publishing our proposed amendments for public comments before submitting them to the Court. We are going to ask the Court for an extension until April 15, 2013. This will allow our committee to consider the revisions at our October meeting, publish our

proposal for public comments and then consider any public comments at our February 2013 meeting (see attached timeline).

Judge Barton spoke with Clerk Hall to determine the best procedure for obtaining clarification from the Court on certain issues. Judge Barton then sent an e-mail to Clerk Hall requesting that clarification (the text of the e-mail is attached). The committee has not received a response to this e-mail.

We had three subcommittee conference calls to discuss these issues on July 26, September 13, and September 27, 2012. The products subcommittee divided into four drafting groups to tackle the project:

1. **Definition of strict liability (defect)**, 403.7, 403.15, 403.18 (Vargas,\* Whitmore, Fox);
2. **Crashworthiness**, 403.16 (Russo,\* Artigliere, Kest, Baggot);
3. **Inferences**, instruction 403.11 (Farmer,\* Boyer, Sales); and
4. **Miscellaneous**: preliminary issues 403.13 and 403.14, model charges, verdict forms, conforming products instructions with recent amendments in the reorganized book and electronic devices decisions (Whitmore,\* Vargas, Artigliere, Boyer).

**A. DEFINITION OF STRICT LIABILITY, 403.7, 403.15, 403.18**

As explained in more detail in the memorandum from the defect drafting team to the products subcommittee dated September 9, 2012, the Supreme Court asked the committee to reconsider the definition of strict liability in 403.7. We also considered instruction 403.15, which lists the statement of the issues, and instruction 408.18, which lists affirmative defenses. Both of these instructions had been preliminarily approved by the Supreme Court, but they use language similar to 403.7 regarding strict liability. The subcommittee reviewed all three instructions to make sure that they remain consistent.

The committee's proposal in the report: In instruction 403.7, the committee submitted a single definition of "strict liability" applicable to both manufacturing and design defect cases. The former instructions gave separate instructions for manufacturing defects in PL 4 and design defects in PL 5. Like PL 5, the committee's proposed 403.7 included both the risk/benefit and ordinary consumer 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, pending 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 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 or an affirmative defense.

The Court sought public comment on several issues, including “whether the proposal merges multiple theories of liability that are different” and “whether the Notes on Use to the instruction should comment on risk/benefit analysis.” The Court also addressed these issues during the oral argument.

During the oral argument, several justices expressed concern that the committee’s proposed instruction 403.7 was confusing because it combined the definitions for a manufacturing defect (PL 4) and design defect (PL 5). The notes on use recognize that the risk/benefit test never applies to a manufacturing defect. Under the committee’s proposal, the jury might mistakenly think that the risk/benefit test applies in a manufacturing case. Justices Lewis, Quince, Pariente and Canady all asked questions regarding the wisdom of combining these instructions.

There was also substantial discussion during the argument on whether the definition of strict liability in 403.7 should include the risk/benefit test, the consumer expectations test, or both. The Court also discussed whether the risk/benefit test should be considered an element of the plaintiff’s claim in instruction 403.7 or an affirmative defense in instruction 403.18.

The Court’s decision: The Court rejected instruction 403.7 and referred it back to the committee “to make revisions consistent with the instructions preliminarily approved by the Court” as set forth in the appendix (Op. 4-5). 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 5. Second, the Court deleted the risk/benefit test from the definition of defect in 403.7 and from the statement of issues in 403.15d. 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 403.7] should be kept separate in order to avoid confusion.” Justice Pariente also recommended retaining the current definition of defect until the issue is decided in an actual case and controversy:

Because this Court has not yet determined that issue and the definition of design defect is in a state of flux in Florida, I agree that the best course of action is to retain the current instructions on design defect, which have been in use since the 1980s, until this Court can reach a definitive substantive decision on this issue, including whether to adopt the Restatement (Third) of Torts regarding the definition of design defect. That decision should be made in the context of a case or controversy and not through an amendment to the jury instructions.

(J. Pariente concurring op., p. 10).

Revisions in response to the decision: The subcommittee recommends the following revisions in response to the Court’s decision:

1. Provide separate definitions for manufacturing defect and design defect, similar to former instructions PL 4 and 5.

2. Retain both the consumer expectations and risk/benefit tests to define a design defect, using the language found in former instructions PL 4 and PL 5. The decision itself does not state it is rejecting the risk/benefit test, which might be expected if the Court intended this type of major change from the existing instructions. 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 preliminarily approved versions of both instructions 403.7 and 403.15d that delete the risk/benefit test from the definition of strict liability. On the other hand, the Court also preliminarily approved instruction 403.18b with the note on use, which states that the instructions take no position on whether the risk/benefit test is an element or affirmative defense.

The subcommittee feels it is premature to delete the risk/benefit test from the definition of strict liability defect in light of recent cases. After the committee filed its initial report, two cases suggest that the risk/benefit test applies to design defect cases. See Union Carbide Corp. v. Aubin, \_\_\_\_ So. 3d \_\_\_\_, 2012 WL 3587127 (Fla. 3d DCA Aug. 22, 2012) (revised on motion for rehearing or certification); Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc., 48 So. 3d 976, 997 (Fla. 3d DCA 2010). The committee note to 403.7 cited several cases that had recognized 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 subcommittee recommends updating this note to include the Union and Agrofollajes cases applying the risk/benefit test.

3. Revise instruction 403.15d, issues on the claim, consistent with the revisions to instruction 403.7.

4. No changes are needed to instruction 403.18, stating that the defendant may be entitled to an instruction on the risk/benefit test as an affirmative defense.

## **B. CRASHWORTHINESS, 403.16**

The committee report proposed instruction 403.16 to be given in crashworthiness cases where the defect enhanced or increased the plaintiff's injury. In December 2009, the Supreme Court sought public comment on issues including whether the committee's proposed crashworthiness instruction, 403.16, "fully and accurately conforms with the principle of law established in D'Amario v. Ford Motor Co., 806 So. 2d 424, 436-41 (Fla. 2001)." During oral argument, Justice Pariente asked questions suggesting that the crashworthiness instruction may need to be revised to make it consistent with D'Amario.

In 2011, which was after the committee submitted its 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 D'Amario v. Ford Motor Co., 806 So. 2d 424, 436-41 (Fla. 2001).

**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. As amended, section 768.81 now provides:

**(1) Definitions.**--As used in this section, the term:

(a) "Accident" means the events and actions that relate to the incident **as well as those events and actions that relate to the alleged defect or injuries, including enhanced injuries.**

....

(c) "Negligence action" means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, **products liability**, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.

(d) "Products liability action" means a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. The term **includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product.** The substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action.

....

**(3) (b) 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.

The Court's decision: The Court rejected instruction 403.16 and referred it back to the committee for further consideration. The majority decision does not give any explanation regarding the revisions needed. Justice Pariente in her concurring opinion explained "that in light of the legislative changes regarding crashworthiness, Instruction 403.16 must be rejected in its present form." (Pariente, J., concurring op. at 7).

Revisions in response to the decision and the 2011 amendment to § 768.81:

For the reasons Liz Russo explained in her detailed memo dated August 27, the products subcommittee recommends deleting the proposed crashworthiness instruction. We recommend replacing the instruction with a note on use stating that in light of the 2011 amendment to section 768.81, it is not necessary to give a special crashworthiness instruction. The jury should still be given instruction 403.2, which explains the nature of an enhanced injury claim.

The subcommittee debated whether the amendment would be retroactively applied to overrule D'Amario. The Legislature expressly states that it intended retroactive application. However, this leaves the question of whether retroactive application violates due process. Brian Baggot reported that there are no appellate cases addressing the constitutionality of retroactive application of this amendment. However, he is aware of approximately six trial court cases applying the statute retroactively. Liz Russo expressed the opinion that our committee is bound to follow the statute until an appellate decision rules the statute cannot be retroactively applied. The subcommittee agreed that we should draft the instructions with the assumption that the amendment is constitutional.

The statute 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." § 768.81(3)(b). The subcommittee agreed that the intent of the statute is to treat defendants in crashworthiness cases like all other defendants for the purposes of apportionment of fault. For this reason, the jury can be given standard instructions explaining that an injury can have more than one cause and apportionment of fault between the

defendant, plaintiff and Fabre 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, we recommend a note on use instead of a special crashworthiness instruction.

The subcommittee considered the thoughtful comments of Judge Kest that we might need to modify the standard causation instruction, 403.12, in crashworthiness cases. He expressed concern that the standard causation instructions may not make clear to jurors that a defect can be a legal cause of the injuries, even though the manufacturer's negligence or fault happened long before the crash. The subcommittee felt that the standard instruction on intervening cause 403.12c already adequately covers situations where the defendant's fault occurs before other causes of the injury. We would, however, like to hear the thoughts of the full committee on this issue at our October meeting.

Brian Baggot felt that we may still need a special instruction in crashworthiness cases 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 consensus of the subcommittee was that the standard instructions on negligence, defect, causation and damages will accurately state the plaintiff's claims, even when the defect caused an enhanced injury.

### **C. INFERENCES, 403.11**

In instruction 403.11, Inference of Product Defect or Negligence, the committee recommended against proposing a standard inference instruction. The committee notes explained that the committee believed 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 under Cassisi v. Maytag Co., 396 So. 1148 (Fla. 1st DCA 1981).

#### **1. The government rules statute, section 768.1256**

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 suffered by the plaintiff. Conversely, if the defendant complies with a government rule, there is a rebuttable presumption that the product is not defective. 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.

Laura Whitmore's memo dated September 21, 2012, does a great job of tracing the committee's history with the government rules instruction. In December 2008, the committee published a government rules instruction. After publication, the committee decided that the law was too unsettled regarding whether the statute created a burden-shifting or a vanishing presumption. Ultimately, the committee submitted a note on use that explained "the 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.

In December 2009, the Supreme Court sought comments on “whether a full instruction under 403.11 should be included in light of section 768.1256, Florida Statutes.” At the oral argument, one presenter, Kathleen O’Connor, argued that the Court needed an instruction on the government rules statute.

The Court’s decision on our products report rejects instruction 403.11 on inferences and refers it back to the committee for further work. The majority decision and the separate opinions do not discuss the inference instruction.

For the reasons explained in Laura Whitmore’s memo dated September 21, 2012, the subcommittee recommends that we again submit the note on use explaining that the law is unsettled on whether an instruction on inferences is appropriate.

Since our original report, no 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 Florida Evidence § 301.1 (2012 ed.) (observing that the government rules statute does not specify whether it creates a bursting bubble or a 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, the Supreme Court discussed jury instructions on presumptions in the context of a different statute. See Univ. Ins. Co. of N. Am. v. Warfel, 82 So. 3d 47 (Fla. 2012). The Court explained that juries do not receive an instruction on presumptions that affect the burden of production, commonly known as a bursting bubble presumption. However, if the presumption is one “affecting the **burden of proof**,” the jury decides whether the conflicting evidence overcomes the presumption. Univ. Ins., 82 So. 3d at 51-53. If the Legislature intends to create a presumption affecting the burden of proof, it usually does so with express language. See id. at 58-59.

If section 768.1256 is interpreted as a presumption creating a burden of production, no instruction should be given under Universal Insurance. Because the law remains unsettled on whether an instruction should be given, the subcommittee recommends again submitting a note on use stating the reasons the committee

declines to propose a government rules instruction. We updated the note on use to add a citation to Warfel. This note is attached as our Option A.

In the event the committee disagrees with the subcommittee's recommendation, we have proposed a government rules instruction to submit to the Supreme Court. This proposed instruction is attached as our Option B.

## **2. Cassisi inferences**

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 recognized in Cassisi v. Maytag Co., 396 So. 2d 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 did not express any concern about the lack of a Cassisi instruction in the publication notice or during oral argument. The subcommittee recommends that the committee again decline to adopt an instruction on the Cassisi inference. This note has been in place since 2004 and the law has not changed. We think it remains correct to decline to propose a Cassisi instruction pending further development in Florida law.

## **D. PRELIMINARY ISSUES, 403.13 & 403.14**

As explained in the e-mail from Laura Whitmore dated September 11, 2012, instructions 403.13 and 403.14 are closely related. The Court rejected instruction 403.13, Preliminary Issue, which sets forth the preliminary issue to be given where the defendant did not have physical possession of the product. The appendix to the decision states that instruction 403.13 is "reserved."

Instruction 403.14 provides the burden of proof for preliminary issues. The decision is inconsistent regarding instruction 403.14. The decision "preliminarily approves" instruction 403.14 on page 4 and includes it in the appendix. But, page 5 of the decision and the Court's referral letter ask the committee to work further on instruction 403.14.

Judge Barton sought clarification from Clerk of Court Tom Hall on the Court's directive to the committee on each of these two instructions. As of the date of this submission, the committee has not received a response. The Court's



publication notice, comments during oral argument, and decision do not give our committee an indication of the type of revisions, if any, intended by the Court.

The subcommittee recommends a slight revision to instruction 403.14 to make it more consistent with the language regarding burden of proof used throughout the reorganized book. There is some inconsistency in the reorganized book regarding the language used for the burden of proof. Most of the instructions on the burden of proof begin the second paragraph with the phrase “However, if the greater weight” (see negligence 401.17) instead of “If, however, the greater weight...” We recommend revising the second paragraph of instruction 403.14 to use the phrase “However, if the . . . .” This will make 403.14 consistent with the majority of the burden of proof instructions in the reorganized book.

#### **E. REVISIONS TO CONFORM INSTRUCTIONS TO THE COURT’S RECENT DECISIONS AND TO CORRECT ERRORS AND OMISSIONS.**

The subcommittee reviewed all of the products decisions to make sure that they are consistent with the revisions the Court made in the appendix. We also made sure the products instructions conform with any amendments to the instructions the Court made after we submitted our original products report. Specifically, the Court asked us to look at two decisions: the decision adopting the reorganized jury instruction book and the decision on electronic devices instructions. We also considered our pending errors and omissions report to make sure that the products instructions are consistent. Finally, we corrected some typos in the products decision.

403.9, negligence: We recommend deleting note on use 1. In the products decision, the Court amended instruction 403.9 (negligence) and 403.10 (negligent failure to warn) to delete language suggesting that the plaintiff had to prove a defect in negligence cases.

In the version of 403.9 the committee submitted, the plaintiff had to prove “negligence is the failure to use reasonable care, which is the care a reasonably careful designer would use . . . **which results in a product being in an unreasonably dangerous condition.**” The Court deleted the defect requirement, “which results in a product being in an unreasonably dangerous condition.”

Similarly, in negligent failure to warn, 403.10, the court deleted the requirement that the negligence in the warning “**make the product unreasonably dangerous.**”

Note on use 1 to instruction 403.9 assumes that a plaintiff has to prove defect in the negligence claim. We recommend deleting note on use 1 to make the notes consistent with the Court’s revisions to our proposed instructions.

403.12, notes on use 1, 2, 3, & 4: (causation instruction): Each of these notes on use mistakenly refers to instruction 403.10. These references need to be changed from 403.10 to the causation instruction, 403.12.

403.17, burden of proof on the main claim: We revised this slightly to make it consistent with the reorganized book (see negligence instruction 401.21, burden of proof on main claim).

Instruction 403.18, Defense Issues: We made some minor revisions, to make 403.18 consistent with instructions in the reorganized book (compare with negligence instruction 401.22, defense issues).

Instruction 403.19, Burden of Proof on Defense Issues: We revised this instruction to correct some discrepancies with the reorganized book (see negligence instruction 401.23). 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.” We believe that it is more accurate and consistent with the negligence instructions to revise instruction 403.19 to “[negligence] [fault] [responsibility].” This is also consistent with our errors and omissions proposal to amend instruction 401.22f.

In the last note on use (preemptive charges on defense issues), we revised the term “preemptive charge” to use the term “preemptive instructions.” This makes the instruction consistent with the analogous negligence instruction 401.23.

We also corrected a bad cross-reference in the last line of the preemptive charge note on use “the ruling should be given immediately after framing the defense issues (instruction ~~403.17~~ 403.18).”

## **F. MODEL CHARGES AND VERDICT FORM**

The subcommittee deferred consideration of the model charges and verdict form until after the October meeting. We felt it would be most productive to wait for the input of the committee on the individual instructions before revising the model charges.

**PRODUCTS SUBCOMMITTEE REPORT OCTOBER 2012**

**We began with the language found in the appendix to the Court's products decision and removed all red-lining. All underlined/strike-through text shows revisions to the instructions in the Court's appendix.**

403.7      STRICT LIABILITY  
(Reserved)

**a. Manufacturing defect**

**A product is defective~~if from a manufacturing defect~~ if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] ~~when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant]~~ and the product is expected to and does reach the user or consumer without substantial change affecting that condition.**

**A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.**

**b. Design defect**

**A product is defective from a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.**

**A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [or] [the risk of danger in the design outweighs the benefits].**

NOTES ON USE

1. A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). ~~In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product]”: “was not built according to its intended design [or] because the product ....”~~ The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981).

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *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). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: Products Liability to define a product defect. See *Union Carbide Corp. v. Aubin*, \_\_\_\_ So. 3d \_\_\_\_, 2012 WL 3587127 (Fla. 3d DCA Aug. 22, 2012) (revised on motions for rehearing or certification); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc.*, 48 So. 3d 976, 997 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the ordinary consumer test. See *Agrofollajes*, \_\_\_\_, 48 So. 3d at 997. Pending 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 risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the

risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.

4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. The decision in *Force* did not directly address correctness of these instructions. ~~Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, \_\_\_ So.2d \_\_\_, 33 FLW S963 (Fla. 2008). See also *Force* at 107. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*.~~

5. When strict liability and negligence claims are tried together, to clarify differences between them 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

6. See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution.

### 403.9 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances.

#### NOTES ON USE FOR 403.9

~~1.— An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product, or from an unsafe design choice for the product. See, e.g., *Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307 (Fla. 3d DCA 1967). A product can also be unreasonably dangerous because it was adulterated, such as with foreign materials in foodstuffs or pharmaceuticals. See, e.g., *Food Fair Stores of Florida, Inc. v. Macurda*, 93 So.2d 860 (Fla. 1957); *E.R. Squibb & Sons Inc. v. Stickney*, 274 So.2d 898 (Fla. 1st DCA 1973).~~

~~1 2.~~ If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, e.g., *Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2d DCA 1967).

~~2 3.~~ In order to clarify the differences between strict liability and negligence when the two claims are tried together, 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

**OPTION A**

**THE SUBCOMMITTEE RECOMMENDS SUBMITTING NOTES ON USE EXPLAINING WHY THE COMMITTEE DOES NOT THINK A STANDARD INSTRUCTION IS APPROPRIATE. THE UNDERLINED LANGUAGE WAS SUBMITTED IN THE COMMITTEE'S ORIGINAL REPORT. THE DOUBLE-UNDERLINED LANGUAGE IS NEW.**

**403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE**

**(Reserved)**

**NOTES ON USE FOR 403.11**

1. Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304; *Univ. Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).



**OPTION B**

**[THE SUBCOMMITTEE RECOMMENDS OPTION A (notes on use instead of an instruction). IF THE COMMITTEE DISAGREES AND FEELS WE SHOULD SUBMIT A GOVERNMENT RULES INSTRUCTION, THE SUBCOMMITTEE SUGGESTS THE FOLLOWING LANGUAGE.**

**IN THE INSTRUCTION, THE UNDERLINED LANGUAGE IS NEW. THE NOTE WAS SUBMITTED IN THE ORIGINAL REPORT. THE STRIKE-THROUGH AND UNDERLINED TEXT IN THE NOTE SHOWS CHANGES FROM THE NOTE SUBMITTED WITH THE COMMITTEE'S ORIGINAL REPORT.**

**403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE**

**(Reserved)**

*a. Product that complied with government rules:*

**If you find that (the product) complied with (describe applicable statute, code, rule, regulation or standard) at the time (the product) was [sold] [or] [delivered], you should presume that (the product) [was not defective][or] [(Defendant) was not negligent] unless (Claimant) proves by the greater weight of the evidence that (the product) did not comply with (describe applicable statute, code, rule, regulation or standard). You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(Defendant) was negligent].**

*b. Product that does not comply with government rules:*

**If you find that (the product) [failed to comply with] (describe applicable statute, code, rule, regulation or standard) at the time (the product) was [sold] [or] [delivered], you should presume that (the product) [was defective] [or] [(Defendant) was negligent] unless (Defendant) proves by the greater weight of the evidence that (the product) complied with (describe applicable statute, code, rule, regulation or standard). You may consider this presumption together with**

**all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(Defendant) was negligent].**

NOTES ON USE FOR 403.11

1. Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304. Pending further development in the law, the committee takes no position on whether an instruction on this statute is appropriate. See *Univ. Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 58-59 (Fla. 2012) (holding the jury should not be instructed on a vanishing presumption). ~~offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.~~

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

## 403.12 LEGAL CAUSE

*a. Legal cause generally:*

**[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.**

*b. Concurring cause:*

**In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].**

*c. Intervening cause:*

*\*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:*

**\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].**

NOTES ON USE FOR 403.12

1. Instruction 403.12a ~~10a~~ (legal cause generally) is to be given in all cases. Instruction 403.12b ~~10b~~ (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.12c ~~10c~~ (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 403.12a ~~10a~~ not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 403.12b ~~10b~~ must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 403.12c ~~10c~~ (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozzer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So.2d 520 (Fla. 1980).

5. "Probable" results. The committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.

6. The term “substantially” is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. “Substantially” was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant’s negligence, *Loftin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff’s contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

**403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE**

**If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].**

**~~If, however,~~ However, if the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].**

**NOTE ON USE FOR 403.14**

The bracketed language is for use if claimant makes alternative claim(s) of liability.

### **403.15 ISSUES ON MAIN CLAIM**

**The [next] issues you must decide on (claimant's) claim against (defendant) are:**

...

*d. Strict Liability -- Manufacturing Defect:*

**whether (the product) [was not built according to its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] ~~[(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer]~~ [or] ~~[the risk of danger in the design outweighed the benefits]~~ and (the product) reached (claimant) without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*e. Strict Liability -- Design Defect:*

**whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).**

*f. Strict Liability — Failure to Warn:*

**whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*g.f. Negligence:*

**whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*h.g. Negligent Failure to Warn:*

**whether (defendant) negligently failed to warn about particular risks involved in the use of (the product), and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

....



**403.16 ISSUES ON CRASHWORTHINESS  
AND “ENHANCED INJURY” CLAIMS**

**[CURRENT INSTRUCTION AND NOTES  
ON USE DELETED]**

**NOTE ON USE**

In 2011, the Legislature amended section 768.81, Florida Statutes, to state that in a products liability case where the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the Legislature intended this amendment to overrule the decision in *D’Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001). See Ch. 2011–215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater or additional injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

#### **403.17 BURDEN OF PROOF ON MAIN CLAIM**

**If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendant)(s) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence ~~does supports~~ [one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence supports (claimant's) claim against one [or] [both] [more] of the defendants], then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them].**

#### **NOTE ON USE FOR 403.17**

Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.

**403.18 DEFENSE ISSUES**

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

On the [first]\* defense, the issue[s] for you to decide [is] [are]:

\*The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.

*a. Comparative Negligence:*

**whether (claimant or person for whose injury or death claim is made) was [himself] [herself] negligent\* in (describe alleged negligence) and, if so, whether such that negligence was a contributing legal cause of the injury or damage to (claimant) ~~complained of~~.**

\*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

*b. Risk/Benefit Defense:*

**whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.**

**NOTE ON USE FOR 403.18b**

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (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). Pending 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 court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

*c. Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304. Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

*d. State-of-the-art Defense:*

**In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product's) manufacture, not at the time of the loss or injury.**

NOTE ON USE FOR 403.18d

Instruction 403.7d applies only in defective design cases. *F.S.* 768.1257.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). Model Charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

### 403.19 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 supports (claimant's) [claim] [one or more of (claimant's) claims], 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] [fault] damages of [both] [all] defendants was caused by each defendant.]

*\*Use the second bracketed language 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] [and] [(identify additional person(s) or entit(y)(ies))] were [negligent] [at fault] and that the [negligence] [fault] 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] [fault] of [both] [all] parties to this action was caused by each of them.~~the total amount of the damages and what percentage of the total damages is chargeable to each party.~~

*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] [at fault] and that the [negligence] [fault] 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] [fault] of [both] [all] parties to this action [and] [(identify additional person(s) or entit(y)(ies))] was caused by ~~is chargeable to~~ each of them.]

*Use the following paragraph in cases without a comparative negligence defense but with an apportionment of 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] [at fault] and that the [negligence] [fault] 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] [fault] of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] was caused by ~~is chargeable to~~ each of them.]**

NOTE ON USE FOR 403.19

*Preemptive instructions ~~charges~~ on defense issues.* If a preemptive instruction ~~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, an instruction ~~charge~~ in the form of instruction 401.13 should be given immediately following instruction 403.15. If a preemptive instruction ~~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 instruction ~~charge~~ announcing the ruling should be given immediately after framing the defense issues (instruction ~~403.18~~ 403.17).

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**Products Liability Subcommittee Report October 2012**

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# Supreme Court of Florida

500 South Duval Street  
Tallahassee, Florida 32399-1925

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MARSHAL

June 4, 2012

Honorable James Manly Barton, II  
Acting Chair, Committee on Standard Jury  
Instructions in Civil Cases  
Hillsborough County Courthouse Annex  
800 East Twiggs Street, Rm. 512  
Tampa, Florida 33602

Re: In re Standard Jury Instructions in Civil Cases-Report No. 09-10  
(Products Liability), Case No. SC09-1264

Dear Judge Barton:

At the direction of the Court, I am writing you in your capacity as Acting Chair of the Committee on Standard Jury Instructions in Civil Cases. On May 17, 2012, the Court issued its corrected opinion in In re Standard Jury Instructions in Civil Cases—Report No. 09-10 (Products Liability), Case No. SC09-1264, providing preliminary approval for future publication and use to instructions 403.1, 403.2, 403.4, 403.5, 403.6, 403.8, 403.9, 403.10, 403.12, 403.14, 403.15, 403.17, 403.18, and 403.19. The Court also rejected the committee's proposals pertaining to instructions 403.3, 403.7, 403.11, 403.13, 403.16, Model Instruction 7, and Special Verdict Form. Specifically, the Court

refer[s] back to the Committee its proposals with regard to instructions 403.7, 403.11, 403.13, 403.14, 403.16, Model Instruction 7 and Special Verdict Form, and the Committee Notes to each of the

Honorable James Manly Barton, II

June 4, 2012

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product liability standard instructions. We direct the Committee to make revisions consistent with the instructions preliminarily approved by the Court for publication in the future and as set forth in the appendix to this opinion, as well as the Court's decision in In re Standard Jury Instructions in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So. 3d 666 (Fla. 2010) and 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). We also direct the Committee to conform all instructions, comments, model forms of instructions, verdict forms, and any related materials to the actions of the Court in this and prior opinions.

Slip op. at 4-5.

For your convenience, I enclose a copy of the Court's corrected opinion in Case No. SC09-1264. Please file with my office the Committee's proposal as requested by the Court in a new report on or before November 19, 2012, with copies to the liaison justice to your committee and the director of Central Staff. If you should determine that more time is required to address these issues, please file a motion for extension of time with my office. Thank you in advance for your consideration of this matter, and please do not hesitate to contact me if you have any questions.

Most cordially,

By: *Vickie Jamblich*  
**Deputy Clerk**

Thomas D. Hall

TDH/ckd/sb

Enclosure

cc: ✓ Honorable R. Fred Lewis, Liaison to Committee  
Ms. Jodi Jennings, Bar Staff Liaison to Committee  
Ms. Deborah J. Meyer, Director of Central Staff

# Supreme Court of Florida

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No. SC09-1264

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## IN RE STANDARD JURY INSTRUCTIONS IN CIVIL CASES—REPORT NO. 09-10 (PRODUCTS LIABILITY).

[May 17, 2012]

### CORRECTED OPINION

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions in Civil Cases (Committee) has submitted extensive proposed changes to the standard civil jury instructions previously authorized by the Court. We now address the amendments directed for use in products liability cases, which the Committee asks the Court to authorize. We have jurisdiction. See art. V, § 2(a), Fla. Const.

### BACKGROUND

On July 16, 2009, the Committee filed a report proposing both new and revised products liability standard jury instructions.<sup>1</sup> At that time, pending before

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1. The Court identified the Committee's proposals by number for ease of consideration, as follows:

the Court was the Committee's proposed general reorganization of the standard civil jury instructions (Case No. SC09-284), which included reorganizing the instructions by separate areas of civil law and renumbering the instructions to reflect that reorganization, as well as modifications intended to improve juror understanding. In large part, the Court authorized, with minor modifications, the

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Proposal 1 – Eliminating “PL Product Liability, Note on Use” and introductory paragraph;

Proposal 2 – Instruction 403.1 – Introduction (new);

Proposal 3 – Instruction 403.2 – Summary of Claims (new);

Proposal 4 – Eliminate current paragraph on burden and add Instruction 403.3 – Greater Weight of the Evidence;

Proposal 5 – Eliminate PL 1 and add Instruction 403.4 – Express Warranty;

Proposal 6 – Eliminate PL 2 and add Instruction 403.5 – Implied Warranty of Merchantability;

Proposal 7 – Eliminate PL 3 and add Instruction 403.6 – Implied Warranty of Fitness for Particular Purpose;

Proposal 8 – Eliminate PL 4, PL 5, Notes on Use, and Comment, and add Instruction 403.7 – Strict Liability;

Proposal 9 – Instruction 403.8 – Strict Liability Failure to Warn (new);

Proposal 10 – Instruction 403.9 – Negligence;

Proposal 11 – Instruction 403.10 – Negligent Failure to Warn (new);

Proposal 12 – Instruction 403.11 – Inference of Product Defect or Negligence (new);

Proposal 13 – Instruction 403.12 – Legal Cause;

Proposal 14 – Instruction 403.13 – Preliminary Issue (new);

Proposal 15 – Instruction 403.14 – Burden of Proof on Preliminary Issue;

Proposal 16 – Instruction 403.15 – Issues on Main Claim;

Proposal 17 – Instruction 403.16 – Issues on Crashworthiness and “Enhanced Injury” Claim (new);

Proposal 18 – Instruction 403.17 – Burden of Proof on Main Claim;

Proposal 19 – Instruction 403.18 – Defense Issues (new);

Proposal 20 – Instruction 403.19 – Burden of Proof on Defense Issues; and

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

Committee's proposals for publication and use. 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).

Prior to filing its report in this case, on December 15, 2008, the Committee published the proposed changes directed to the products liability instructions for public comment in The Florida Bar News. Five comments were received, each addressing a number of the proposals. The Court also sought public comment on specific issues pertaining to particular proposals, which appeared in the January 1, 2010, edition of The Florida Bar News. Following receipt of numerous comments, the Court heard oral argument on May 5, 2010.

### **DISCUSSION**

In lieu of the products liability standard instructions previously authorized under the former standard civil jury instruction structure, see In re Standard Jury Instructions (Civil Cases), 435 So. 2d 782 (Fla. 1983), and upon consideration of the proposals, comments, and oral arguments presented in this case, we hereby take the following action. First, we provide preliminary approval for publication in the future of the proposals with regard to standard instructions 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; instruction 403.17 – Burden of Proof on Main Claim; and instruction 403.19 – Burden of Proof on Defense Issues.

Second, the following jury instructions are preliminarily approved for publication in the future as modified: instruction 403.9 – Negligence; and instruction 403.18 – Defense Issues (new).

Last, the Court rejects the following proposals: instruction 403.3 – Greater Weight of the Evidence; instruction 403.7 – Strict Liability; instruction 403.11 – Inference of Product Defect or Negligence (new); instruction 403.13 – Preliminary Issue (new); instruction 403.16 – Issues on Crashworthiness and “Enhanced Injury” Claim (new); and Model Instruction 7 and Special Verdict Form.<sup>2</sup> Instead, the Court preliminarily approves for publication in the future instruction 403.3, consistent with previously authorized “Greater Weight of the Evidence” standard civil jury instructions.<sup>3</sup> We refer back to the Committee its proposals with regard

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2. The numerical assigned placement for such instructions is reserved, however.

3. For example, see the following instructions: 401.3 (negligence cases); 402.3 (professional negligence cases); 404.3 (insurer’s bad faith cases); 405.3 (defamation cases); 406.3 (malicious prosecution cases); 407.3 (false imprisonment cases); 408.3 (tortious interference with business relationships);

to instructions 403.7, 403.11, 403.13, 403.14, 403.16, Model Instruction No. 7 and the Special Verdict Form, and the Committee Notes to each of the products liability standard instructions. We direct the Committee to make revisions consistent with the instructions preliminarily approved by the Court for publication in the future and as set forth in the appendix to this opinion, as well as the Court's decisions in In re Standard Jury Instructions in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So. 3d 666 (Fla. 2010) and 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). We also direct the Committee to conform all instructions, comments, model forms of instructions, verdict forms, and any related material to the actions of the Court in this and prior opinions. All of the foregoing must be completed before publication and use. Accordingly, until further order of the Court, we withhold authorization of the approved instructions.<sup>4</sup> The approvals are only preliminary

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409.3 (misrepresentation cases); 410.3 (outrageous conduct causing severe emotional distress cases); 412.5 (cases involving contribution among tortfeasors); and 413.3 (cases involving claim for personal injury protection benefits (medical benefits only)). 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).

4. We direct the Clerk of Court, on behalf of the Court, to send a referral letter to the Committee, to include information with regard to the procedure the Committee is to follow in submitting its revised proposals to the Court in accord with this decision.



because this group of instructions must be viewed as a full package before authorization can be provided.

### CONCLUSION

In providing preliminary approval for the standard civil jury instructions for publication in the future, as set forth in the appendix, we express no opinion on their correctness. We further caution all interested parties that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability. New language is indicated by underscoring and deletions are indicated by struck-through type. The instructions as set forth in the appendix shall be effective when the entire package of products liability material is completed and the instructions are authorized by the Court. We caution that further work is required before publication and use of these preliminary products liability instructions, model forms, verdict forms, and any other material relating to the foregoing.

It is so ordered.

PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.

PARIENTE, J., concurs with an opinion.

CANADY, C.J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

QUINCE, concurs in part and dissents in part with an opinion.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

PARIENTE, J., concurring.

A dedicated group of individuals has worked very hard in reorganizing the Standard Civil Jury Instructions for Products Liability, and I thank those Committee members. I concur with our decision to grant preliminary approval for the adoption of the majority of the proposed instructions. I further agree that in light of the legislative changes regarding crashworthiness, Instruction 403.16 must be rejected in its present form.

I write to explain my reasons for agreeing with the majority's rejection of proposed Instruction 403.7, Strict Liability. As to Instruction 403.7, the Committee had proposed merging the definitions of manufacturing defect and design defect. I believe that the definitions of manufacturing defect and design defect should be kept separate in order to avoid confusion.

The definition of a manufacturing defect currently contained in existing Instruction PL4 states: "A product is unreasonably dangerous because of a manufacturing defect if it was not built according to its intended design and fails to perform as safely as an ordinary consumer would expect." This clarifies that the risk/benefit test is not a definition of an unintended manufacturing defect. Further, in the Committee's proposed notes on use, paragraph 1, the Committee specifically explains that the "risk/benefit test does not apply in cases involving claims of

manufacturing defect,” citing to Cassisi v. Maytag, 396 So. 2d 1140, 1146 (Fla. 1st DCA 1981). That is a correct statement of the law.

With regard to design defect, the current Instruction PL5 states that “[a] product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].” These alternative definitions encompass both the consumer expectations test and the risk/benefit test.

With regard to defining design defect, according to commentator Larry S. Stewart, Instruction 403.7 was the “primary focus” of a “barrage of advocacy.” I have read all the comments submitted, both those in favor and those against the proposed changes, and realize that the advocacy on both sides continues in this Court. The existing committee note to PL5 has stated that the instruction defines “ ‘unreasonably dangerous’ both in terms of consumer expectations . . . and in terms weighing the design risk against its utility.” It also explains that the instruction was adopted in response to this Court’s opinion in Ford Motor Co. v. Hill, 404 So. 2d 1049, 1052 n.4 (Fla. 1981), which directed the Committee to improve its products liability jury instruction.

In the proposed notes on use, paragraph 3, the Committee explains that the proposed instruction “retain[ed] the consumer expectations test and the risk/benefit

test for product defect,” both of which previously appeared in PL5, Design Defect. The proposed committee note specifically explained in paragraph 3 that “[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.” In fact, proposed committee note 4 explains that Florida has not yet adopted provision 2(b) of the Restatement (Third) of Torts, Products Liability, which defines a design defect. In support, the proposed committee note cites to Liggett Group, Inc. v. Davis, 973 So. 2d 467 (Fla. 4th DCA 2008), which recognized that this Court has only adopted the Restatement (Second) of Torts. The Fourth District subsequently certified the following specific question to this Court: “Should Florida adopt the Restatement (Third) of Torts for design defect cases?” Liggett Grp., Inc. v. Davis, 973 So. 2d 684, 685 (Fla. 4th DCA 2008). We declined to answer the certified question, as pointed out in the committee note.

After the proposed committee notes were written, the Third District decided the case of Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., 48 So. 3d 976, 996 (Fla. 3d DCA 2010), in which the Third District did adopt the Restatement (Third) of Torts, Products Liability, and rejected the “consumer expectations” test as an independent basis for finding a design defect. The Third District reversed a verdict in favor of the plaintiffs in part based on a jury instruction that was

patterned after current Instruction PL5. Agrofollajes, 48 So. 3d at 996. Although a majority of this Court did not vote to accept jurisdiction in Agrofollajes, I hope that we will have the opportunity in the near future to clarify the law regarding the proper definition of design defect and whether the definition varies depending on the type of product involved. I would urge the appellate courts to bring this issue to our attention by way of a certified question of great public importance in the appropriate case.

Because this Court has not yet determined that issue and the definition of design defect is in a state of flux in Florida, I agree that the best course of action is to retain the current instructions on design defect, which have been in use since the 1980s, until this Court can reach a definitive substantive decision on this issue, including whether to adopt the Restatement (Third) of Torts regarding the definition of design defect. That decision should be made in the context of a case or controversy and not through an amendment to the jury instructions.

CANADY, C.J., concurring in part and dissenting in part.

I dissent from the Court's preliminary approval of new standard instructions 403.9 (Negligence); 403.10 (Negligent Failure to Warn); and 403.18 (Defense Issues). Because these particular instructions and certain of the comments associated with them have generated substantial controversy, I conclude that it

would be appropriate for the Court to now refrain from approving these instructions. The Court should defer addressing the contested issues until presented with a proper case for adjudication. I concur with the preliminary approval of the other new standard jury instructions.

POLSTON, J., concurs.

QUINCE, J., concurring in part and dissenting in part.

I agree with Chief Justice Canady that we should not authorize for publication or use new standard instruction 403.10 (Negligence Failure to Warn). However, I also conclude that standard instruction 403.18 as modified should be authorized for publication and use.

#### Original Proceedings – Supreme Court Committee on Jury Instruction (Civil)

Tracy Raffles Gunn, Chair, Supreme Court Committee on Jury Instructions (Civil), Gunn Appellate Practice, Tampa, Florida, Gary M. Farmer of Farmer, Jaffe, Weissing, et al., Fort Lauderdale, Florida, Joseph Hagedorn Lang, Jr. of Carlton Fields, P.A., Tampa, Florida, and Judge James Manly Barton, II, Thirteenth Judicial Circuit, Tampa, Florida,

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Responding with comments

## APPENDIX

### PL

#### PRODUCT LIABILITY

##### Issues

~~PL 1 — Express warranty~~

~~PL 2 — Implied warranty of merchantability~~

~~PL 3 — Implied warranty of fitness for particular purpose~~

~~PL 4 — Strict liability (manufacturing defect)~~

~~PL 5 — Strict liability (design defect)~~

~~Burden of proof (greater weight of the evidence)~~

##### Defense issues

#### 403 PRODUCTS LIABILITY

403.1 Introduction

403.2 Summary of Claims

403.3 Greater Weight of the Evidence

403.4 Express Warranty

403.5 Implied Warranty of Merchantability

403.6 Implied Warranty of Fitness for Particular Purpose

403.7 Strict Liability

403.8 Strict Liability Failure to Warn

403.9 Negligence

403.10 Negligent Failure to Warn

403.11 Inference of Product Defect or Negligence (reserved)

403.12 Legal Cause

403.13 Preliminary Issue (reserved)

403.14 Burden of Proof on Preliminary Issue



<b><u>403.15</u></b>	<b><u>Issues on Main Claim</u></b>
<b><u>403.16</u></b>	<b><u>Issues on Crashworthiness and “Enhanced Injury” Claims</u></b>
<b><u>403.17</u></b>	<b><u>Burden of Proof on Main Claim</u></b>
<b><u>403.18</u></b>	<b><u>Defense Issues</u></b>
<b><u>403.19</u></b>	<b><u>Burden of Proof on Defense Issues</u></b>

**PL**  
**PRODUCT LIABILITY**

**NOTE ON USE**

~~The instructions in this Part PL PRODUCT LIABILITY do not contain instructions on Negligence. When alternative issues of negligence are to be submitted, use Charge 3.5 on Negligence Issues, as in Model Charge No. 8.~~

~~The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective~~

**403.1 INTRODUCTION**

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

**NOTES ON USE FOR 403.1**

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 403.1. See Model Charge 1. Instruction 403.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 403.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences, with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. Fla.R.Civ.P. 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. Rule 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge as the judge reads the instructions aloud.

## **403.2 SUMMARY OF CLAIMS**

**The claims [defenses] in this case are as follows. (Claimant) claims that the (describe product) [designed] [manufactured] [distributed] [imported] [sold] [or] [supplied] by (defendant) was defective and that the defect in the (describe product) caused [him] [her] harm.**

**[(Claimant) [also] claims that [he] [she] sustained greater or additional injuries than what [he] [she] would have sustained in the (describe accident) if the (describe product) had not been defective.]**

**[(Claimant) [also] claims that (defendant) was negligent in (describe alleged negligence), which caused [him] [her] to be injured by (the product).]**

**(Defendant) denies [that] [those] claim(s) [and also claims that (claimant) was [himself] [herself] negligent in (describe the alleged comparative negligence), which caused [his] [her] harm]. [Additionally (describe any other affirmative defenses).]**

**[The parties] [(claimant)] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

### **NOTE ON USE FOR 403.2**

**Use the second paragraph for crashworthiness claims. See instruction 403.16. Use the first bracketed phrase in the fourth paragraph when there is a claim of comparative negligence. Use the second bracketed sentence where there are additional affirmative defenses.**

### 403.3 GREATER WEIGHT OF THE EVIDENCE

“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

#### NOTES ON USE FOR 403.3

1. Greater or lesser number of witnesses. The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. Circumstantial evidence. The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

*PL 1 express warranty*

**403.4 EXPRESS WARRANTY**

**A product is defective if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction]; on which (name) relied in the [purchase and] use of the product. [~~Sueh-a~~ The representation must be one of fact, rather than opinion.]**

*PL 2 implied warranty of merchantability*

**403.5 IMPLIED WARRANTY OF MERCHANTABILITY**

**A product is defective if it is not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant).**

*PL 3 implied warranty of fitness for particular purpose*

**403.6 IMPLIED WARRANTY OF FITNESS FOR  
PARTICULAR PURPOSE**

**A product is defective if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which, the purchaser bought the product in reliance on the judgment of (defendant), the purchaser bought the product.**



*PL 4 strict liability (manufacturing defect)*

~~if by reason of a manufacturing defect it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.~~

*PL 5 strict liability (design defect)*

~~if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].~~

~~If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).~~

~~[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)].~~  
~~\*\*[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].~~

~~“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.~~

NOTES ON USE

~~If it is determined that a Negligence instruction is appropriate in addition to a Product Liability (PL) instruction, use charge 3.5 on Negligence Issues as in Model Charge No. 8.~~

~~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).~~

~~\*When the injured person is a bystander, use the language in the second pair of brackets. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997).~~

~~\*\*When defense issues are to be submitted, use the charge contained within this second pair of brackets. In other cases, use the first bracketed sentence instead.~~

#### COMMENT

~~1. *Privity*. These charges on product liability issues presuppose that any question of privity has been resolved in favor of the claim. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see § 672.318, Fla. Stat. (1987), and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n. 4 (Fla. 1988). Should it be necessary to submit to the jury a factual issue on privity, the committee recommends that it be submitted in the style of a preliminary charge on status or duty as in SJI 3.2.~~

~~2. *Strict liability (Restatement of Torts 2d § 402A)*. Charge PL 4, derived from § 402A as adopted in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), is appropriate for a strict liability claim against the manufacturer based on an alleged manufacturing flaw in the product. In response to *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1052 n. 4 (Fla. 1981), directing the committee to improve its product liability charge, the committee recommends PL 5 for design defect cases, stating standards for determining when a product is “unreasonably dangerous” because of design.~~

~~PL 5 defines “unreasonably dangerous” both in terms of consumer expectations, see comment i to § 402A of the Restatement, and in terms weighing~~

~~the design risk against its utility. These concepts are discussed in *Radiation Tech. Inc., v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143-45 (Fla. 1st DCA 1981); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.~~

~~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).~~

~~The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. *West*, 336 So.2d at 87; but see *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, 455-56 (1978), quoted in *Cassisi*, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.~~

~~Pending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller.~~

~~3.—*Obvious defects, opportunity to inspect, disclaimers.* These concepts are not covered by the standard charges. See *Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).~~

~~4.—*Uniform Commercial Code.* There are many open questions concerning the meaning and application in Florida personal injury litigation of certain U. C. C. provisions. Compare *Schuessler v. Coca Cola Bottling Company of Miami*, 279 So.2d 901 (Fla. 4th DCA 1973), with *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 177 (Fla. 1970). Accordingly, the committee has not undertaken to express U. C. C. concepts, as such, in these jury charges. A U. C. C. provision which is held to be applicable may be read or appropriately paraphrased for the jury. In order to avoid undue emphasis, the committee recommends that the provision read or paraphrased not be identified as a statute.~~

5.—~~Comparative negligence.~~ Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar, supra* n. 2. Model charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer and model charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

6.—The committee takes no position regarding whether the injured bystander must be foreseeable. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).

7.—Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981); *GeneCorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

## 403.7 STRICT LIABILITY

(Reserved)

### ~~a. Manufacturing defect~~

~~A product is defective if it is unreasonably dangerous when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] and the product reaches the user or consumer without substantial change affecting that condition.~~

### ~~b. Design defect~~

~~A product is unreasonably dangerous to [the user] [a person in the vicinity of the product] if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]].~~

### NOTES ON USE FOR 403.7

1.—~~A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product]”: “was not built according to its intended design [or] because the product ....” The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981).~~

2.—~~*Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When~~

~~there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.~~

3. ~~This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *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). Pending 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 risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.~~

4. ~~In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, \_\_\_ So.2d \_\_\_, 33 FLW S963 (Fla. 2008). See also *Force* at 107. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*.~~

5. ~~When strict liability and negligence claims are tried together, to clarify differences between them 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).~~

6. ~~See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution.~~

### 403.8 STRICT LIABILITY FAILURE TO WARN

A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.

#### NOTES ON USE FOR 403.8

1. The following cases recognize strict liability for a failure to warn of defects. *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

### 403.9 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances.

#### NOTES ON USE FOR 403.9

1. An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product, or from an unsafe design choice for the product. See, e.g., *Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307 (Fla. 3d DCA 1967). A product can also be unreasonably dangerous because it was adulterated, such as with foreign materials in foodstuffs or pharmaceuticals. See, e.g., *Food Fair Stores of Florida, Inc. v. Macurda*, 93 So.2d 860 (Fla. 1957); *E.R. Squibb & Sons Inc. v. Stickney*, 274 So.2d 898 (Fla. 1st DCA 1973).

2. If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, e.g., *Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2d DCA 1967).

3. In order to clarify the differences between strict liability and negligence when the two claims are tried together, 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).



#### 403.10 NEGLIGENCE FAILURE TO WARN

[Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances.] Reasonable care on the part of (defendant) requires that (defendant) give appropriate warning(s) about particular risks of (the product) which (defendant) knew or should have known are involved in the reasonably foreseeable use(s) of the product.

#### NOTE ON USE FOR 403.10

The cases recognize a claim for negligent failure to warn. *Ferayorni v. Hyundai*, 711 So.2d 1167 (Fla. 4th DCA 1998). When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

**403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE**

**(Reserved)**

## 403.12 LEGAL CAUSE

### a. Legal cause generally:

[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.

### b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].

### c. Intervening cause:

\*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:

\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].

## NOTES ON USE FOR 403.12

1. Instruction 403.10a (legal cause generally) is to be given in all cases. Instruction 403.10b (concurring cause), to be given when the court considers it

necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.10c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 403.10a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 403.10b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 403.10c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So.2d 520 (Fla. 1980).

5. "Probable" results. The committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test

of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff's contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

**403.13 PRELIMINARY ISSUE**

**(Reserved)**

#### **403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE**

**If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].**

**If, however, the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].**

#### **NOTE ON USE FOR 403.14**

**The bracketed language is for use if claimant makes alternative claim(s) of liability.**

### 403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) claim against (defendant) are:

a. Express Warranty:

whether (the product) failed to conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction], on which (name) relied in the [purchase and] use of the product, and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

b. Implied Warrant of Merchantability:

whether (the product) was not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant) and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

c. Implied Warranty of Fitness for Particular Purpose:

whether (the product) was not reasonably fit for the specific purpose for which (defendant) knowingly sold (the product) and for which (claimant) bought (the product) in reliance on the judgment of (defendant) and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

d. Strict Liability:

whether (the product) [was not built according to its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] and (the product) reached (claimant) without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

e. Strict Liability — Failure to Warn:



whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

*f. Negligence:*

whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

*g. Negligent Failure to Warn:*

whether (defendant) negligently failed to warn about particular risks involved in the use of (the product), and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

403.16 ISSUES ON CRASHWORTHINESS AND "ENHANCED INJURY"  
CLAIMS(RESERVED)

~~[In addition, there is a second set of issues you must also decide in this case.]\*  
(Claimant) [next] claims [he] [she] suffered [greater] [or] [additional] injuries in  
the accident than [he] [she] would have otherwise suffered if (describe the alleged  
crashworthiness defect) had not been defective. (Claimant) does not claim that  
(describe the alleged crashworthiness defect) caused the accident.\*\*~~

~~\*Use the bracketed language when there are other defect claims in the case.~~

~~\*\*The defendant is entitled to have the jury instructed on this last sentence  
"when appropriate." D'Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001).~~

~~The issues you must decide on this claim are whether (describe the alleged  
defective part of the product) was defective and, if so, whether that defect was a  
legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for  
whose injury claim is made) that was [greater than] [or] [additional to that which]  
[he] [she] would have suffered if (describe the alleged defective part of the  
product) had not been defective.~~

~~A product is defective if it is unreasonably dangerous when it leaves the  
possession of the [manufacturer] [seller] [distributor] [supplier] [importer]  
[defendant] and the product reaches the user or consumer without substantial  
change affecting that condition.~~

~~A product is unreasonably dangerous to [the user] [a person in the vicinity of  
the product]\* if [the product fails to perform as safely as an ordinary consumer  
would expect when used as intended or when used in a manner reasonably  
foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]].~~

~~\*When the injured person is a bystander, use the language in the second set of  
brackets. See West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976), and  
Sanchez v. Hussey Seating Co., 698 So.2d 1326 (Fla. 1st DCA 1997). See 403.7  
note 2.~~

~~Normally a defendant is responsible for only [loss] [injury] [or] [damage]  
caused by its product and not the actions of others. If you find that the (describe the  
alleged defective part of the product) was defective and that defect caused [loss]  
[injury] [or] [damage] to (claimant) that was [greater than] [or] [additional to that~~

~~which] would have resulted from the accident if (describe the alleged defective part of the product) had not been defective, you should try to separate the damages caused by (describe the alleged defective part of the product), determine what part of (claimant's) [loss] [injury] [or] [damage] resulted from (describe the alleged defective part of the product), and the actions of others and award (claimant) money only for those damages caused by (describe the alleged defective part of the product). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).~~

#### NOTES ON USE FOR 403.16

~~1. The term "enhanced injury" is not used in this instruction. Although cases use that term, the committee believes that "enhance" has a connotation not appropriate for describing traumatic injuries. More appropriate terms might be "aggravated," "increased injury," or "separate injury." For that reason, the committee has used quotation marks for the term "enhanced injury" in the title to this instruction. Although many of these claims involve motor vehicles, there is no reason the same principle would not apply to any "enhanced injury" claim regardless of the product involved.~~

~~2. Use this instruction for "crashworthiness" claims instead of instruction 403.15. But instruction 403.15 should be used together with this instruction when there is also a defect claim that does not involve a claim of an "enhanced injury." In cases in which there is a claim that one defect caused the accident but a different defect caused an "enhanced injury," it may be necessary to identify the separate defects.~~

~~3. It is not necessary to repeat the definition of defectiveness in paragraph 2 of this instruction if it has already been given as part of earlier instructions.~~

~~4. This instruction retains the risk/benefit test for product defect, which previously appeared in PL 5. As noted in Note 3 to instruction 403.7, pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard of product defect or an affirmative defense. See 403.7, 403.18. The risk/benefit test is provided in both instructions to illustrate how it is used in either case. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.~~

### **403.17 BURDEN OF PROOF ON MAIN CLAIM**

**If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence does support one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence supports (claimant's) claim against one or [both] [more] of the defendants], then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them.**

#### **NOTE ON USE FOR 403.17**

**Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.**

## 403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

On the [first] defense, the issue[s] for you to decide [is] [are]:

a. *Comparative Negligence:*

whether (claimant) was [himself] [herself] negligent\* and, if so, whether such negligence was a contributing legal cause of the injury or damage complained of.

\*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

b. *Risk/Benefit Defense:*

whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.

### NOTE ON USE FOR 403.18b

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (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). Pending 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 court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

c. *Government Rules Defense:*

No instruction provided.

### NOTE ON USE FOR 403.18c

Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304. Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

d. State-of-the-art Defense:

**In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product's) manufacture, not at the time of the loss or injury.**

NOTE ON USE FOR 403.18d

Instruction 403.7d applies only in defective design cases. F.S. 768.1257.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). Model Instruction 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Instruction 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

### 403.19 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 supports (claimant's) [claim] [one or more of (claimant's) claims], 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 damages was caused by each defendant.]

*\*Use the second bracketed language 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] [and] [(identify additional person(s) or entit(y)(ies))] were at fault and that the fault of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form the total amount of the damages and what percentage of the total damages is chargeable to each party.

*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 at fault and that the fault 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 fault of [both] [all] parties to this action [and] [(identify additional person(s) or entit(y)(ies))] is chargeable to each of them.]

*Use the following paragraph in cases without a comparative negligence defense but with an apportionment of 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 at fault and that the fault 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 fault of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] is chargeable to each of them.]

NOTE ON USE FOR 403.19

*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 instruction 401.13 should be given immediately following instruction 403.15. 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 (instruction 403.17).



## **MODEL CHARGE NO. 7**

**(product liability case; negligence and implied and express  
warranty claims; comparative negligence as defense)**

### *Facts of the hypothetical case*

John Smith's lawn had many pebbles in it, and he asked Ms. Best of Best Hardware Store, Inc., whether the Best model E power mower, featured in Best's sale of discontinued items, was suitable for cutting such a lawn. Best manufactured and sold such mowers directly to the public. Ms. Best replied that the Best model E had a guard which deflected material out and down, instead of sideways, so that it could safely be used in those circumstances. At the time of the sale, Ms. Best could not find an owner's manual for the mower, but she promised to send one to Smith. The manual contained an express warning against mowing over loose impediments, such as gravel, stones and small rocks. Smith bought the mower, and mowed his lawn that same day. He observed a few rocks being propelled ten to twenty feet forward from the mower, but continued to mow. A large rock was propelled sideways, bouncing off of a nearby wall and into Smith's eye. Smith sued Best Hardware for negligence, breach of an express warranty and breach of an implied warranty of fitness for a particular purpose. Best denied those allegations and pleaded Smith's comparative negligence. Those issues are to be submitted to the jury.

### *The court's charge*

**[2.1] Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.**

**The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that may be admitted or agreed to by the parties.**

**In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and**

~~common sense lead you to draw from the facts shown by the evidence in this case, but you should not speculate on any matters outside the evidence.~~

~~[2.2a] In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.~~

~~[2.2b] Some of the testimony before you was in the form of opinions about certain technical subjects.~~

~~You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.~~

~~[2.4] In your deliberations, you are to consider three distinct claims. Plaintiff, John Smith, alleges, first, that defendant, Best Hardware, was negligent in the transaction about which you have heard evidence; second, that Best breached an express warranty made in selling the lawn mower in question; and, third, that Best breached an implied warranty that the mower was fit for a particular purpose. Best denies all claims and, further, alleges, as a defense to all claims, that Smith was, himself, negligent in the operation of the lawn mower. Although all of Smith's claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.~~

~~[Conventional charge on claim 3.5] The issues for your determination on the negligence claim of plaintiff Smith against defendant Best Hardware are whether Best was negligent in failing to warn Smith of a known danger in the operation of the lawn mower sold to Smith by Best and, if so, [3.6c] whether such negligence was a legal cause of injury or damage sustained by Smith.~~

~~[4.1] Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.~~

~~[3.7] If the greater weight of the evidence does not support the *negligence* claim of Smith, then your verdict *on that claim* should be for Best Hardware.~~

~~[PL] The issues for your determination on the *breach of warranty* claims of plaintiff, Smith, against defendant, Best Hardware, are whether the lawn mower sold by Best was defective when it left the possession of Best and, if so, whether such defect was a legal cause of injury or damage sustained by Smith. The product is defective [PL 1] if it does not conform to representations of fact made by Best, orally or in writing, in connection with the sale, on which Smith relied in the purchase and use of the product. Such a representation must be one of fact, rather than opinion. The product is also defective [PL 3] if it is not reasonably fit for the specific purpose for which Best knowingly sold the product and for which Smith bought the product in reliance on the judgment of Best.~~

~~[PL resumed] If the greater weight of the evidence does not support *either of the breach of warranty* claims of Smith, your verdict *on those claims* should be for Best Hardware.~~

~~[3.8 and PL combined] However, if the greater weight of the evidence does support *any one of Smith's claims*, then you shall consider the defense raised by Best Hardware. On the defense, the issues for your determination are [3.8a modified] whether Smith was, himself, negligent *in his operation or use of the lawn mower* and, if so, whether such negligence was a contributing legal cause of the injury or damage complained of.~~

~~[3.8 modified] If the greater weight of the evidence does not support the defense of Best Hardware, and the greater weight of the evidence does support *one or more of the claims* of Smith, then your verdict should be for Smith in the total amount of his damages. If, however, the greater weight of the evidence shows *either that Best Hardware was negligent or that the lawn mower was defective in the manner I have described*, and shows also that Smith was~~

~~negligent, and that the negligence of Best, or the defect, and the negligence of Smith each contributed as a legal cause of injury or damage sustained by Smith, you should determine and write on the verdict form what percentage of the total fault of both parties to this action is chargeable to each.~~

~~[3.9] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.~~

~~[5.1a and 5.2a combined] Negligence or a defect in a product is a legal cause of loss, injury or damage if it directly and in a natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence or defect, the loss, injury or damage would not have occurred.~~

~~[5.1b and 5.2b combined] In order to be regarded as a legal cause of loss, injury or damage, negligence or a defect in a product need not be the only cause. Negligence or a defect may be a legal cause of loss, injury or damage even though it operates in combination with the act of another, if such other cause occurs at the same time as the negligence, or at the same time the defect has its effect, and if the negligence or defect contributes substantially to producing such loss, injury or damage.~~

~~[6.1c] If your verdict is for Best Hardware on all of Smith's claims, you will not consider the matter of damages. But, if you find for Smith on any of his claims, you should determine and write on the verdict form, in dollars, the total amount of damage which the greater weight of the evidence shows he sustained as a result of the incident complained of, including any such damage as Smith is reasonably certain to experience in the future. You shall consider the following elements:~~

~~[6.2a] Any bodily injury sustained by Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.~~

~~[6.2c] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Smith in the past, or to be so obtained in the future.~~

~~[6.2d] Any earnings lost in the past, and any loss of ability to earn money in the future.~~

~~[6.9a] If the greater weight of the evidence shows that Smith has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long Smith may be expected to live. Such tables are not binding on you, but may be considered together with other evidence in the case bearing on Smith's health, age and physical condition, before and after the injury, in determining the probable length of his life.~~

~~[6.10] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value should be stated in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Smith for these losses as they are actually experienced in future years.~~

~~[6.1c, resumed] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Smith. The court will enter a judgment based on your verdict and, if you find that Smith was negligent in any degree, the court, in entering judgment, will reduce the total amount of damages by the percentage of negligence which you find is chargeable to Smith.~~

~~[7.1] Your verdict must be based on the evidence that has been received, and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.~~

~~[7.2] When you retire to the jury room, you should select one of your number to act as foreman or forewoman, to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. You will be given a verdict form, which I shall now read and explain to you.~~

*(Court reads and explains verdict form)*

~~When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign it. You may now retire to consider your verdict.~~

*Special Verdict Form*

**VERDICT**

~~We, the jury, return the following verdict:~~

~~1. Was there negligence on the part of defendant, Best Hardware Store, Inc., which was a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~2. Was the lawn mower defective when sold and, if so, was the defect a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~If your answers to questions 1 and 2 are both NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to either question 1 or question 2 is YES, please answer question 3.~~

~~3. Was there negligence on the part of plaintiff, John Smith, which was a legal cause of his damage?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~If your answer to question 3 is YES, please answer question 4. If your answer to question 3 is NO, skip question 4 and answer question 5.~~

~~4. State the percentage of any fault, which was a legal cause of damage to plaintiff, John Smith, that you charge to:~~

~~Defendant, Best Hardware Store \_\_\_\_\_%~~

~~Plaintiff, John Smith \_\_\_\_\_%~~

Total must be 100%\_\_\_\_\_

~~Please answer question 5.~~

~~5. What is the total amount (100%) of any damages sustained by plaintiff, John Smith, and caused by the incident in question?~~

~~Total damages of plaintiff, John Smith\_\_\_\_\_ \$\_\_\_\_\_~~

~~In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Smith. If you find plaintiff, John Smith, negligent in any degree, the court, in entering judgment, will reduce Smith's total amount of damages (100%) by the percentage of negligence which you find is chargeable to Smith.~~

~~SO SAY WE ALL, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.~~

~~FOREMAN\_\_\_\_\_ OR  
FOREWOMAN~~

NOTE ON USE

~~For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Form 8.1.~~

## MODEL CHARGE NO. 8

**(product liability case; negligence  
and strict liability claims;  
comparative negligence defense)**

### *Facts of the hypothetical case*

John Smith was injured when he was struck by a new hay baler being driven by Dilbert Driver on the highway near Driver's farm. The hay baler suddenly swerved across the road into the path of Smith, who was approaching in the opposite direction. At the time, Smith was watching a group of deer in a field near the road, and failed to observe the hay baler in time to avoid the collision with his vehicle. An examination of the hay baler revealed that part of the steering mechanism was designed in such a way that it could not sustain the speed of highway driving. The mechanism had broken, making it impossible for Driver to steer the baler. There was evidence that a person could have observed the weakened condition of the steering mechanism had he or she examined it before driving the hay baler. Smith sued Driver, alleging that his operation of the hay baler had been negligent. Smith also sued the manufacturer of the hay baler, Mishap Manufacturing Co., and the retailer seller, Sharp Sales Co., alleging that the hay baler had been defectively built and that both had been negligent in their inspections of the hay baler. He sought recovery against both the manufacturer and the retailer on claims of (1) negligence and (2) strict liability. The defendants denied liability, and affirmatively alleged that Smith had been comparatively negligent. All issues are to be submitted to the jury.

### *The court's charge*

**[2.1] Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.**

**The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that may be admitted or agreed to by the parties.**



~~In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case, but you should not speculate on any matters outside the evidence.~~

~~[2.2a] In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.~~

~~[2.2b] Some of the testimony before you was in the form of opinions about certain technical subjects.~~

~~You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.~~

~~[2.4] In your deliberations, you are to consider several distinct claims. Plaintiff, John Smith, alleges, first, that defendant Dilbert Driver was negligent in operating the hay baler in the circumstances shown by the evidence, and that such negligence was a legal cause of injury to Smith. Smith also alleges that the defendants Mishap Manufacturing Company, the manufacturer, and Sharp Sales Company, the retail seller, were negligent — Mishap in designing, manufacturing and inspecting the baler, and Sharp in inspecting it before sale. Finally, Smith also alleges that, regardless of whether they were negligent or not, Mishap and Sharp should be held strictly liable for his damages because they placed the hay baler on the market in a defective condition, unreasonably dangerous to the user. All three defendants deny these claims and assert, as a defense, that Smith was, himself, negligent in the operation of his vehicle. Although Smith's claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates~~

~~to each claim separately, as you would had each claim been tried before you separately.~~

~~[Conventional charge on claim 3.5] The issues for your determination on the negligence claims of plaintiff Smith against defendants are whether defendant Driver was negligent in operating the hay baler at the time and place in question, whether defendant Mishap was negligent in designing, manufacturing or inspecting the hay baler, thereby placing it on the market in a defective condition, and whether defendant Sharp was negligent in inspecting the hay baler before sale; and, if so, [3.6c] whether such negligence was a legal cause of loss, injury or damage sustained by Smith.~~

~~[4.1] Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.~~

~~[3.7] If the greater weight of the evidence does not support the negligence claim of plaintiff Smith against defendant Driver, or defendant Mishap, or defendant Sharp, then your verdict on that claim should be for that defendant.~~

~~[PL] The issues for your determination on the strict liability claims of plaintiff Smith against defendants Mishap and Sharp are whether the hay baler sold by the defendant was defective when it left the possession of the defendant and, if so, whether such defect was a legal cause of loss, injury or damage sustained by Smith. A product is defective [PL 4] if it is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~[PL resumed] If the greater weight of the evidence does not support the strict liability claim of plaintiff Smith against Mishap, the manufacturer, or against Sharp, the retail seller, then your verdict on that claim should be for that defendant.~~

~~[3.8 and PL combined] However, if the greater weight of the evidence does support plaintiff Smith's negligence claim against any defendant or his strict liability claim against defendant Mishap or defendant Sharp, then you shall consider the defense raised by that defendant. On the defense, the issues~~

for your determination are ~~[3.8a] whether Smith was, himself, negligent in the operation of his vehicle, and, if so, whether such negligence was a contributing legal cause of the injury or damage complained of.~~

~~[3.8 modified] If the greater weight of the evidence does not support the defense of defendants, and the greater weight of the evidence does support one or more of the claims of Smith, then your verdict should be for Smith in the total amount of his damages. If, however, the greater weight of the evidence shows that one or more of the defendants were negligent or that the hay baler was defective when sold by defendant Mishap or by defendant Sharp, and the evidence shows also that Smith was negligent, you should determine and write on the verdict form what percentage of the total fault of all parties to this action is chargeable to each.~~

~~[3.9] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.~~

~~[5.1a and 5.2a combined] Negligence or a defect in a product is a legal cause of loss, injury or damage if it directly and in a natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence or defect, the loss, injury or damage would not have occurred.~~

~~[5.1b and 5.2b combined] In order to be regarded as a legal cause of loss, injury or damage, negligence or a defect in a product need not be the only cause. Negligence or a defect may be a legal cause of loss, injury or damage even though it operates in combination with the act of another, if such other cause occurs at the same time as the negligence, or at the same time the defect has its effect, and if the negligence or defect contributes substantially to producing such loss, injury or damage.~~

~~[6.1c] If your verdict is for all defendants on all of plaintiff Smith's claims, you will not consider the matter of damages. But, if you find for Smith on any of his claims against any defendant, you should determine and write on the verdict form, in dollars, the total amount of loss or damage which the greater weight of the evidence showed Smith sustained as a result of the incident complained of, including any such damage as Smith is reasonably certain to experience in the future. You shall consider the following elements:~~

~~[6.2a] Any bodily injury sustained by Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.~~

~~[6.2c] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Smith in the past, or to be so obtained in the future.~~

~~[6.2d] Any earnings lost in the past, and any loss of ability to earn money in the future.~~

~~[6.9a] If the greater weight of the evidence shows that Smith has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long Smith may be expected to live. Such tables are not binding on you, but may be considered together with other evidence in the case bearing on Smith's health, age and physical condition, before and after the injury, in determining the probable length of his life.~~

~~[6.10] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Smith for these losses as they are actually experienced in future years.~~

~~[6.1c, resumed] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Smith. The court will enter a judgment based on your verdict and, if you find that Smith was negligent in any degree, the court, in entering judgment, will reduce the total amount of damages by the percentage of negligence which you find is chargeable to Smith.~~

~~[7.1] Your verdict must be based on the evidence that has been received, and the law on which I have instructed you. In reaching your verdict, you are~~

~~not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.~~

~~[7.2] When you retire to the jury room, you should select one of your number to act as foreman or forewoman, to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. You will be given a verdict form, which I shall now read and explain to you.~~

*(Court reads and explains verdict form)*

~~When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign it. You may now retire to consider your verdict.~~

*Special Verdict Form*

### **VERDICT**

~~We, the jury, return the following verdict:~~

~~1a. Did defendant Mishap Manufacturing Co. place the hay baler on the market with a defect which was a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~1b. Was there negligence on the part of defendant Mishap Manufacturing Co. which was a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~2a. Did defendant Sharp Sales Co. place the hay baler on the market with a defect which was a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~2b. Was there negligence on the part of defendant Sharp Sales Co. which was a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~3. Was there negligence on the part of defendant Dilbert Driver which was a legal cause of damage to plaintiff, John Smith?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~If your answers to this point are all NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to any of the preceding questions is YES, please answer question 4.~~

~~4. Was there negligence on the part of plaintiff, John Smith, which was a legal cause of his damage?~~

~~\_\_\_\_\_ YES \_\_\_\_\_ NO \_\_\_\_\_~~

~~Please answer question 5.~~

~~5. State the percentage of any responsibility for plaintiff Smith's damages that you charge to:~~

~~Defendant Mishap Manufacturing Co.  
(fill in only if you answered YES to  
question 1a, question 1b, or both) \_\_\_\_\_%~~

~~Defendant Sharp Sales Co. (fill in  
only if you answered YES to question  
2a, question 2b, or both) \_\_\_\_\_%~~

~~Defendant Dilbert Driver (fill in only  
if you answered YES to question 3) \_\_\_\_\_%~~

~~Plaintiff, John Smith (fill in only if  
you answered YES to question 4) \_\_\_\_\_%~~

~~TOTAL RESPONSIBILITY OF ALL PARTIES MUST BE 100%~~

~~Please answer question 6.~~

~~6. What is the total amount (100%) of any damages sustained by plaintiff, John Smith, and caused by the incident in question?~~

~~Total damages of plaintiff, John Smith \_\_\_\_\_ \$ \_\_\_\_\_~~

~~In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Smith. If you find plaintiff, John Smith, negligent in any degree, the court, in entering judgment, will reduce Smith's total amount of damages (100%) by the percentage of negligence which you find is chargeable to Smith.~~

~~SO SAY WE ALL, this \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_.~~

~~\_\_\_\_\_  
FOREMAN \_\_\_\_\_ OR  
FOREWOMAN \_\_\_\_\_~~

#### NOTE ON USE

~~For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Form 8.1.~~

#### COMMENT ON MODEL CHARGE NO. 8

~~The Committee purposefully omitted from this hypothetical case, and from Model Charge No. 7, any possible claim by John Smith against the retailer or manufacturer based upon an implied warranty theory. Whether or not Smith was in privity with either defendant, see § 672.318, Fla. Stat. (1995), and regardless of any implied warranty claim that may have existed notwithstanding the strict liability claim, see *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 n. 4 (Fla. 1988), the claims in this hypothetical case included no claim of implied warranty.~~

~~The model charge and verdict form assume that both the negligence and strict liability claims are to be submitted to the jury. In cases involving claims of both negligent and defective DESIGN, however, submission of both claims may result in an inconsistent verdict. See, e.g., *Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391 (Fla. 4th DCA 1984); *Ashby Div. of Consolidated Aluminum Corp. v. Dobkin*, 458 So.2d 335 (Fla. 3d DCA 1984), *North American Catamaran Racing*~~

~~*Ass'n v. McCollister*, 480 So.2d 669 (Fla. 5th DCA 1985). See also *Moorman v. American Safety Equipment*, 594 So.2d 795 (Fla. 4th DCA 1992).~~



**PL**  
PL  
PRODUCT LIABILITY

NOTE ON USE

**Former  
products  
instructions**

The instructions in this Part PL PRODUCT LIABILITY do not contain instructions on Negligence. When alternative issues of negligence are to be submitted, use Charge 3.5 on Negligence Issues, as in Model Charge No. 8.

**The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective**

*PL 1 express warranty*

**if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction], on which (name) relied in the [purchase and] use of the product. [Such a representation must be one of fact, rather than opinion.]**

*PL 2 implied warranty of merchantability*

**if it is not reasonably fit for the uses intended or reasonably foreseeable by (defendant).**

*PL 3 implied warranty of fitness for particular purpose*

**if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which the purchaser bought the product in reliance on the judgment of (defendant).**

*PL 4 strict liability (manufacturing defect)*

**if by reason of a manufacturing defect it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.**

**A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.**

*PL 5 strict liability (design defect)*

**if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.**

**A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].**

**If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).**

**[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)]. \*\*[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].**

**“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.**

#### NOTES ON USE

If it is determined that a Negligence instruction is appropriate in addition to a Product Liability (PL) instruction, use charge 3.5 on Negligence Issues as in Model Charge No. 8.

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).

\*When the injured person is a bystander, use the language in the second pair of brackets. *See West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997).

\*\*When defense issues are to be submitted, use the charge contained within this second pair of brackets. In other cases, use the first bracketed sentence instead.

#### COMMENT

1. *Privity*. These charges on product liability issues presuppose that any question of privity has been resolved in favor of the claim. For the effect of strict liability doctrine on claims of warranty previously requiring privity, *see* § 672.318, Fla. Stat. (1987), and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n. 4 (Fla. 1988). Should it be necessary to submit to the jury a factual issue on privity, the committee recommends that it be submitted in the style of a preliminary charge on status or duty as in SJ1 3.2.

2. *Strict liability (Restatement of Torts 2d § 402A)*. Charge PL 4, derived from § 402A as adopted in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), is appropriate for a strict liability claim against the manufacturer based on an alleged manufacturing flaw in the product. In response to *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1052 n. 4 (Fla. 1981), directing the committee to improve its product liability charge, the committee recommends PL 5 for design defect cases, stating standards for determining when a product is “unreasonably dangerous” because of design.

PL 5 defines “unreasonably dangerous” both in terms of consumer expectations, *see* comment i to § 402A of the Restatement, and in terms weighing the design risk against its utility. These concepts are discussed in *Radiation Tech. Inc., v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143–45 (Fla. 1st DCA 1981); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733

(Fla. 2d DCA 1991). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.

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).

The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. *West*, 336 So.2d at 87; *but see Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, 455–56 (1978), quoted in *Cassisi*, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.

Pending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller.

3. *Obvious defects, opportunity to inspect, disclaimers.* These concepts are not covered by the standard charges. *See Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

4. *Uniform Commercial Code.* There are many open questions concerning the meaning and application in Florida personal injury litigation of certain U. C. C. provisions. Compare *Schuessler v. Coca-Cola Bottling Company of Miami*, 279 So.2d 901 (Fla. 4th DCA 1973), with *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 177 (Fla. 1970). Accordingly, the committee has not undertaken to express U. C. C. concepts, as such, in these jury charges. A U. C. C. provision which is held to be applicable may be read or appropriately paraphrased for the jury. In order to avoid undue emphasis, the committee recommends that the provision read or paraphrased not be identified as a statute.

5. *Comparative negligence.* Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar*, *supra* n. 2. Model charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer and model charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

6. The committee takes no position regarding whether the injured bystander must be foreseeable. *See West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).

7. Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. *See Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981); *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); *see also Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

PL  
PRODUCT LIABILITY

Appendix A  
to committee  
Report  
- Instructions as  
proposed by  
committee in  
July 2009

Issues

PL 1 — ~~Express warranty~~

PL 2 — ~~Implied warranty of merchantability~~

PL 3 — ~~Implied warranty of fitness for particular purpose~~

PL 4 — ~~Strict liability (manufacturing defect)~~

PL 5 — ~~Strict liability (design defect)~~

~~Burden of proof (greater weight of the evidence)~~

Defense issues

403 PRODUCTS LIABILITY

- 403.1 Introduction
- 403.2 Summary of Claims
- 403.3 Greater Weight of the Evidence
- 403.4 Express Warranty
- 403.5 Implied Warranty of Merchantability
- 403.6 Implied Warranty of Fitness for Particular Purpose
- 403.7 Strict Liability
- 403.8 Strict Liability Failure to Warn
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- 403.11 Inference of Product Defect or Negligence
- 403.12 Legal Cause
- 403.13 Preliminary Issue
- 403.14 Burden of Proof on Preliminary Issue
- 403.15 Issues on Main Claim
- 403.16 Issues on Crashworthiness and "Enhanced Injury" Claims
- 403.17 Burden of Proof on Main Claim

**403.18**      **Defense Issues**

**403.19**      **Burden of Proof on Defense Issues**

**PL**  
**PRODUCT LIABILITY**

**NOTE ON USE**

~~The instructions in this Part PL PRODUCT LIABILITY do not contain instructions on Negligence. When alternative issues of negligence are to be submitted, use Charge 3.5 on Negligence Issues, as in Model Charge No. 8.~~

~~The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective~~

**403.1 INTRODUCTION**

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

**NOTES ON USE FOR 403.1**

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 403.1. See Model Charge 1. Instruction 403.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 403.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences, with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a

verdict on an issue.

2. Fla.R.Civ.P. 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. Rule 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge as the judge reads the instructions aloud.

### **403.2 SUMMARY OF CLAIMS**

**The claims [defenses] in this case are as follows. (Claimant) claims that the (describe product) [designed] [manufactured] [distributed] [imported] [sold] [or] [supplied] by (defendant) was defective and that the defect in the (describe product) caused [him] [her] harm.**

**[(Claimant) [also] claims that [he] [she] sustained greater or additional injures than what [he] [she] would have sustained in the (describe accident) if the (describe product) had not been defective.]**

**[(Claimant) [also] claims that (defendant) was negligent in (describe alleged negligence), which caused [him] [her] to be injured by (the product).]**

**(Defendant) denies [that] [those] claim(s) [and also claims that (claimant) was [himself] [herself] negligent in (describe the alleged comparative negligence), which caused [his] [her] harm]. [Additionally (describe any other affirmative defenses).]**

**[The parties] [(claimant)] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

#### **NOTE ON USE FOR 403.2**

**Use the second paragraph for crashworthiness claims. See instruction 403.16. Use the first bracketed phrase in the fourth paragraph when there is a claim of comparative negligence. Use the second bracketed sentence where there are additional affirmative defenses.**



### **403.3 GREATER WEIGHT OF THE EVIDENCE**

**“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case. A claim [or defense] is proven by the greater weight of the evidence if you find, from the evidence presented in court, that the claim [or defense] is more likely true than not true.**

#### **NOTES ON USE FOR 403.3**

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

3. *“Preponderance of evidence” and “burden of proof.”* The committee recommends that no instruction be given using these terms, which are considered not helpful to a jury and not necessary in a charge that otherwise defines “greater weight of the evidence” and instructs the jury on the consequences of its determining that the greater weight of the evidence supports or does not support the claim or defense of a party.

~~PL 1 express warranty~~

#### **403.4 EXPRESS WARRANTY**

**A product is defective if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction], on which (name) relied in the [purchase and] use of the product. [~~Such a~~The representation must be one of fact, rather than opinion.]**

~~PL 2 implied warranty of merchantability~~

#### **403.5 IMPLIED WARRANTY OF MERCHANTABILITY**

**A product is defective if it is not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant).**

*~~PL 3 implied warranty of fitness for particular purpose~~*

**403.6 IMPLIED WARRANTY OF FITNESS FOR  
PARTICULAR PURPOSE**

**A product is defective if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which, ~~the purchaser bought the product~~ in reliance on the judgment of (defendant), the purchaser bought the product.**

*PL 4 strict liability (manufacturing defect)*

~~if by reason of a manufacturing defect it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.~~

*PL 5 strict liability (design defect)*

~~if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].~~

~~If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).~~

~~[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)]. \*\*[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].~~

~~“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.~~

NOTES ON USE

~~If it is determined that a Negligence instruction is appropriate in~~

~~addition to a Product Liability (PL) instruction, use charge 3.5 on Negligence Issues as in Model Charge No. 8.~~

~~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).~~

~~\*When the injured person is a bystander, use the language in the second pair of brackets. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997).~~

~~\*\*When defense issues are to be submitted, use the charge contained within this second pair of brackets. In other cases, use the first bracketed sentence instead.~~

## COMMENT

~~1. *Privity*. These charges on product liability issues presuppose that any question of privity has been resolved in favor of the claim. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see § 672.318, Fla. Stat. (1987), and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n. 4 (Fla. 1988). Should it be necessary to submit to the jury a factual issue on privity, the committee recommends that it be submitted in the style of a preliminary charge on status or duty as in SJ 3.2.~~

~~2. *Strict liability* (Restatement of Torts 2d § 402A). Charge PL 4, derived from § 402A as adopted in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), is appropriate for a strict liability claim against the manufacturer based on an alleged manufacturing flaw in the product. In response to *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1052 n. 4 (Fla. 1981), directing the committee to improve its product liability charge, the committee recommends PL 5 for design defect cases, stating standards for determining when a product is “unreasonably dangerous” because of design.~~

~~PL 5 defines “unreasonably dangerous” both in terms of consumer~~

~~expectations, see comment i to § 402A of the Restatement, and in terms weighing the design risk against its utility. These concepts are discussed in *Radiation Tech. Inc., v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143-45 (Fla. 1st DCA 1981); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.~~

~~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).~~

~~The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. *West*, 336 So.2d at 87; but see *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, 455-56 (1978), quoted in *Cassisi*, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.~~

~~Pending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller.~~

~~3. *Obvious defects, opportunity to inspect, disclaimers.* These concepts are not covered by the standard charges. See *Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).~~

~~4. *Uniform Commercial Code.* There are many open questions concerning the meaning and application in Florida personal injury litigation of certain U. C. C. provisions. Compare *Schuessler v. Coca Cola Bottling Company of Miami*, 279 So.2d 901 (Fla. 4th DCA 1973), with *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), cert. denied, 237 So.2d 177 (Fla. 1970). Accordingly, the committee has not undertaken to express U. C. C. concepts, as such, in these jury charges. A U. C. C. provision which is held to be applicable may be read or appropriately paraphrased for the jury. In order to avoid undue emphasis, the committee recommends that the~~

~~provision read or paraphrased not be identified as a statute.~~

~~5.—*Comparative negligence.* Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar, supra* n. 2. Model charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer and model charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.~~

~~6.—The committee takes no position regarding whether the injured bystander must be foreseeable. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).~~

~~7.—Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981); *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).~~



### 403.7 STRICT LIABILITY

A product is defective if it is unreasonably dangerous when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] and the product reaches the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous to [the user] [a person in the vicinity of the product] if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [or] [the risk of danger in the design of the product outweighs the benefits of the product].

#### NOTES ON USE FOR 403.7

1. A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product]”: “was not built according to its intended design [or] because the product ...” The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981).

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. This instruction retains the consumer expectations test and the

risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *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). Pending 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 risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.

4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, \_\_\_ So.2d \_\_\_, 33 FLW S963 (Fla. 2008). See also *Force* at 107. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*.

5. When strict liability and negligence claims are tried together, to clarify differences between them 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

6. See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution.

### **403.8 STRICT LIABILITY FAILURE TO WARN**

**A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.**

#### **NOTES ON USE FOR 403.8**

1. The following cases recognize strict liability for a failure to warn of defects. McConnell v. Union Carbide Corp., 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); Union Carbide Corp. v. Kavanaugh, 879 So.2d 42, 45 (Fla. 4th DCA 2004); Scheman-Gonzalez v. Saber Manufacturing Co., 816 So.2d 1133 (Fla. 4th DCA 2002); Ferayorni v. Hyundai Motor Co., 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

### 403.9 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances, which results in a product being in an unreasonably dangerous condition.

#### NOTES ON USE FOR 403.9

1. An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product, or from an unsafe design choice for the product. See, e.g., *Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307 (Fla. 3d DCA 1967). A product can also be unreasonably dangerous because it was adulterated, such as with foreign materials in food stuffs or pharmaceuticals. See, e.g., *Food Fair Stores of Florida, Inc. v. Macurda*, 93 So.2d 860 (Fla. 1957); *E.R. Squibb & Sons Inc. v. Stickney*, 274 So.2d 898 (Fla. 1st DCA 1973).

2. If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, e.g., *Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2d DCA 1967).

3. In order to clarify the differences between strict liability and negligence when the two claims are tried together, 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

#### **403.10 NEGLIGENT FAILURE TO WARN**

**[Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances.]**  
**Reasonable care on the part of (defendant) requires that (defendant) give appropriate warning(s) about particular risks of (the product) which (defendant) knew or should have known are involved in the reasonably foreseeable use(s) of the product and which make the product unreasonably dangerous.**

#### **NOTE ON USE FOR 403.10**

The cases recognize a claim for negligent failure to warn. *Ferayorni v. Hyundai*, 711 So.2d 1167 (Fla. 4th DCA 1998). When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

## **403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE**

### **NOTES ON USE FOR 403.11**

1. Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304. Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

## 403.12 LEGAL CAUSE

### a. Legal cause generally:

[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.

### b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].

### c. Intervening cause:

\*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:

\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].

NOTES ON USE FOR 403.12

1. Instruction 403.10a (legal cause generally) is to be given in all cases. Instruction 403.10b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.10c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

- 2. The jury will properly consider instruction 403.10a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

- 3. Instruction 403.10b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

- 4. Instruction 403.10c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozzer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So.2d 520 (Fla. 1980).

- 5. "Probable" results. The committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.



6. The term “substantially” is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. “Substantially” was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant’s negligence, *Loftin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff’s contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

### **403.13 PRELIMINARY ISSUE**

**The first issue you must decide is whether (defendant) was in a position to [correct defects in (the product) before it was sold] [or] [control the risk of harm that (the product) might cause after it was sold to (claimant or ultimate user)] [or] [whether (defendant), by its conduct, created the defect or assumed the responsibility that (the product) might be defective].**

#### **NOTES ON USE FOR 403.13**

1. This instruction is for use when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution. See *Riveria v. Baby Trend Inc.*, 914 So.2d 1102 (Fla. 4th DCA 2005) (defendant sold product to retailer, it was marketed under defendant's name, and defendant accepted payment for the product); *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla. 1994) (strict liability applies to hotel which was actively involved in marketing of product and product was marketed from its property). If the claim is based on the defendant's status as the designer, manufacturer, importer, or retailer of the product, then this instruction should not be given because the standard strict liability instructions, 403.7 and 403.15(d), cover the issues.

2. *Privity*. These instructions on products liability issues assume that any question of privity has been resolved in favor of the claimant. If it is necessary to submit a factual issue on privity to the jury, the committee recommends that it be submitted in the style of a preliminary charge on status or duty. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see F.S. 672.318 and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n.4 (Fla. 1988).

#### **403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE**

**If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].**

**If, however, the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].**

#### **NOTE ON USE FOR 403.14**

**The bracketed language is for use if claimant makes alternative claim(s) of liability.**

#### 403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) claim against (defendant) are:

a. *Express Warranty:*

whether (the product) failed to conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction], on which (name) relied in the [purchase and] use of the product, and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

b. *Implied Warrant of Merchantability:*

whether (the product) was not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant) and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

c. *Implied Warranty of Fitness for Particular Purpose:*

whether (the product) was not reasonably fit for the specific purpose for which (defendant) knowingly sold (the product) and for which (claimant) bought (the product) in reliance on the judgment of (defendant) and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

d. *Strict Liability:*

whether (the product) [was not built according to its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant) without substantial change affecting the condition in which it was sold and, if so, whether that

failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

*e. Strict Liability — Failure to Warn:*

whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

*f. Negligence:*

whether (defendant) was negligent in (describe alleged negligence) which caused (the product) to be unreasonably dangerous, and, if so, whether that unreasonably dangerous condition was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

*g. Negligent Failure to Warn:*

whether (defendant) negligently failed to warn about particular risks involved in the use of (the product) which caused (the product) to be unreasonably dangerous, and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

**403.16 ISSUES ON CRASHWORTHINESS AND “ENHANCED INJURY” CLAIMS**

**[In addition, there is a second set of issues you must also decide in this case.]\* (Claimant) [next] claims [he] [she] suffered [greater] [or] [additional] injuries in the accident than [he] [she] would have otherwise suffered if (describe the alleged crashworthiness defect) had not been defective. (Claimant) does not claim that (describe the alleged crashworthiness defect) caused the accident.\*\***

\*Use the bracketed language when there are other defect claims in the case.

\*\*The defendant is entitled to have the jury instructed on this last sentence “when appropriate.” *D’Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001).

**The issues you must decide on this claim are whether (describe the alleged defective part of the product) was defective and, if so, whether that defect was a legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made) that was [greater than] [or] [additional to that which] [he] [she] would have suffered if (describe the alleged defective part of the product) had not been defective.**

**A product is defective if it is unreasonably dangerous when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] and the product reaches the user or consumer without substantial change affecting that condition.**

**A product is unreasonably dangerous to [the user] [a person in the vicinity of the product]\* if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [or] [the risk of danger in the design of the product outweighs the benefits of the product].**

\*When the injured person is a bystander, use the language in the second set of brackets. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). See 403.7 note 2.

Normally a defendant is responsible for only [loss] [injury] [or] [damage] caused by its product and not the actions of others. If you find that the (describe the alleged defective part of the product) was defective and that defect caused [loss] [injury] [or] [damage] to (claimant) that was [greater than] [or] [additional to that which] would have resulted from the accident if (describe the alleged defective part of the product) had not been defective, you should try to separate the damages caused by (describe the alleged defective part of the product), determine what part of (claimant's) [loss] [injury] [or] [damage] resulted from (describe the alleged defective part of the product), and the actions of others and award (claimant) money only for those damages caused by (describe the alleged defective part of the product). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).

#### NOTES ON USE FOR 403.16

1. The term “enhanced injury” is not used in this instruction. Although cases use that term, the committee believes that “enhance” has a connotation not appropriate for describing traumatic injuries. More appropriate terms might be “aggravated,” “increased injury,” or “separate injury.” For that reason, the committee has used quotation marks for the term “enhanced injury” in the title to this instruction. Although many of these claims involve motor vehicles, there is no reason the same principle would not apply to any “enhanced injury” claim regardless of the product involved.

2. Use this instruction for “crashworthiness” claims instead of instruction 403.15. But instruction 403.15 should be used together with this instruction when there is also a defect claim that does not involve a claim of an “enhanced injury.” In cases in which there is a claim that one defect caused the accident but a different defect caused an “enhanced injury,” it may be necessary to identify the separate defects.

3. It is not necessary to repeat the definition of defectiveness in paragraph 2 of this instruction if it has already been given as part of earlier instructions.

4. This instruction retains the risk/benefit test for product defect.

which previously appeared in PL 5. As noted in Note 3 to instruction 403.7, pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard of product defect or an affirmative defense. See 403.7, 403.18. The risk/benefit test is provided in both instructions to illustrate how it is used in either case. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.



#### **403.17 BURDEN OF PROOF ON MAIN CLAIM**

**If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence does support one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence supports (claimant's) claim against one or [both] [more] of the defendants], then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them.**

#### **NOTE ON USE FOR 403.17**

**Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.**

#### **403.18 DEFENSE ISSUES**

**If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).**

**On the [first] defense, the issue[s] for you to decide [is] [are]:**

*a. Comparative Negligence:*

**whether (claimant) was [himself] [herself] negligent\* and, if so, whether such negligence was a contributing legal cause of the injury or damage complained of.**

\*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

*b. Risk/Benefit Defense:*

**whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.**

#### **NOTE ON USE FOR 403.18b**

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (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). Pending 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 court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

*c. Government Rules Defense:*

No instruction provided.

#### **NOTE ON USE FOR 403.18c**

Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304. Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

d. State-of-the-art Defense:

**In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product’s) manufacture, not at the time of the loss or injury.**

NOTE ON USE FOR 403.18d

Instruction 403.7d applies only in defective design cases. F.S. 768.1257.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). Model Charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

#### **403.19 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 supports (claimant's) claim [one or more of (claimant's) claims], 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 damages was caused by each defendant.]**

*\*Use the second bracketed language 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] [and] [(identify additional person(s) or entit(y)(ies))] were at fault and that the fault of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form the total amount of the damages and what percentage of the total damages is chargeable to each party.**

*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 at fault and that the fault 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 fault of [both] [all] parties to this action [and] [(identify additional person(s) or entit(y)(ies))] is chargeable to each of them.]**

*Use the following paragraph in cases without a comparative negligence defense but with an apportionment of 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 at fault and that the fault 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 fault of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] is chargeable to each of them.]**

**NOTE ON USE FOR 403.19**

*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 instruction 401.13 should be given immediately following instruction 403.15. 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 (instruction 403.17).

## Conversion Chart

Additions to the Conversion Chart covering Products Liability instructions:

<u>Old No.</u>	<u>Title</u>	<u>New No.</u>
PL 1	Express Warranty	403.4
PL 2	Implied Warranty of Merchantability	403.5
PL 3	Implied Warranty of fitness for Particular Purpose	403.6
PL 4	Strict Liability (manufacturing defect)	403.7
PL 5	Strict Liability (design defect)	403.7
5.2	Legal Cause (Product Liability)	403.12

model charges  
verdict<sup>+</sup> form  
omitted

# Court's Publication Notice (12/8/09)

The Committee on Standard Jury Instructions in Civil Cases (Committee) has submitted its report proposing both new and revised civil jury instructions to be used in product liability actions. In re Standard Jury Instructions in Civil Cases – Report No. 09-10 (Products Liability), Case No. SC09-1264. The Committee's proposals also include its new numbering system for standard civil jury instructions under the reorganization project, the subject of pending Case No. SC09-284, In re Standard Jury Instructions in Civil Cases – Report No. 09-01 (Reorganization of the Civil Jury Instructions). The Committee published the proposed product liability instructions for public comment in the December 15, 2008, edition of The Florida Bar News. Upon initial review, the Court has identified specific proposals that require further discussion, as identified below.

Accordingly, the Court invites all interested persons to comment on the proposed product liability standard jury instructions identified below, which are available in full online at

<http://www.floridasupremecourt.org/decisions/proposed.shtml#jurycivil>.

An original and nine paper copies of all comments must be filed with the Court on or before February 1, 2010, with a certificate of service verifying that a copy has been served on the Committee on Standard Jury Instructions in Civil Cases Chair, Tracy Raffles Gunn, Gunn Appellate Practice P.A., 400 North Ashley Drive Suite 2055, Tampa, FL 33602. A separate request for oral argument should also be filed if the person filing the comment wishes to participate in oral argument, which will be scheduled in this case at a later date and also limited to the proposed instructions identified below. The Committee has until February 22, 2010, to file a response to any comments filed with the Court. Electronic copies of all comments and responses also must be filed in accordance with the Court's administrative order in In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

For ease of reference, the specific proposals have been numbered. Comments filed with the Court should include the designated proposal number as indicated below.

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

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

the proposal should address the distinction between strict liability and negligence

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

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

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

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

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

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

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

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

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

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

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



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

**Debra Gregory**

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**From:** Rebecca Mercier-Vargas  
**Sent:** Thursday, June 21, 2012 4:58 PM  
**To:** Elizabeth Russo; David Sales (david@salesappeals.com); (ctjujk1@ocnjcc.org); Laura Whitmore (Laura.Whitmore@arlaw.com); Gary M. Farmer (farmergm@att.net); gfox@stfbllaw.com  
**Cc:** Barton, James ; Jodi B Jennings; jlang@carltonfields.com; lacone, Diane  
**Subject:** RE: SJL: products liability subcommittee  
**Attachments:** image001.jpg

Thanks, everyone, for your responses on the best time for a conference call. It looks like the best time for the most people is Wednesday, June 27 at noon. I look forward to talking to you then. Here is the information number for the conference call:

Call-in number: 888-376-5050

Participant pin: 9658741256

Leader pin: 26589

For your information, Judge Barton sent the following e-mail to Tom Hall, the Clerk of the Supreme Court, asking for clarification on a few issues arising from the products liability decision:

\*\*\*\*

Tom, I enjoyed talking with you Tuesday afternoon. At your request, I am emailing you a few questions arising from the Court's May 18, 2012 corrected opinion in In re Standard Jury Instructions in Civil Cases-Report No. 09-10 (Products Liability), Case No. SC09-1264 and your letter to me dated June 4, 2012:

1. According to the May 18, 2012 Corrected Opinion ("Opinion"), Sections 403.10 and 403.15 proposed in Report No. 09-10 ("the Report") were preliminarily approved as proposed, but those two sections contained in the Appendix to the Opinion have been modified. Conversely, the Opinion indicates that section 403.18 is approved as modified, but Section 403.18 contained in the Appendix does not appear to modify the Committee's proposal contained in the Report. Should the Committee infer that Sections 403.10, 403.15 and 403.18 contained in the appendix to the Opinion are what the Court approved?
2. According to the Opinion, Section 403.14 proposed in the Report was preliminarily approved, but the Opinion also refers Section 403.14 to the

- Committee for appropriate revision. Should the Committee, notwithstanding the language in the Opinion indicating preliminary approval, revise Section 403.14.
3. The Opinion rejects Section 403.11 (Inference of Product Defect or Negligence) which contains no instruction with Notes on Use indicating that no standard instructions are recommended, pending further development in case law. Does the Court request the Committee to propose standard instructions on one or both issues discussed in the Notes on Use?
  4. The Committee in Sections 403.7 and 403.15(d) submitted essentially the same description of strict liability. The Court in its opinion rejected Section 403.7 but preliminarily approved Section 403.15(d). Should the Committee revise both sections, or should the Committee revise Section 403.7 based on the language contained in Section 403.15(d)?
  5. Should the Committee modify its usual procedure of publishing proposed instructions in the Florida Bar News and allowing a one month period for comment in order to meet the November 19, 2012 deadline contained in your June 4, 2012 letter to me, or would the Court prefer the Committee to adhere to its normal publication and notice procedures and request an extension, if necessary?

\*\*\*\*

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**From:** Rebecca Mercier-Vargas  
**Sent:** Friday, June 15, 2012 5:41 PM  
**To:** Elizabeth Russo; David Sales ([david@salesappeals.com](mailto:david@salesappeals.com)); ([ctjujk1@ocnjcc.org](mailto:ctjujk1@ocnjcc.org)); Laura Whitmore ([Laura.Whitmore@arlaw.com](mailto:Laura.Whitmore@arlaw.com)); Gary M. Farmer ([farmergm@att.net](mailto:farmergm@att.net)); [gfox@stfblaw.com](mailto:gfox@stfblaw.com)  
**Cc:** Barton, James ; Jodi B Jennings; [jlang@carltonfields.com](mailto:jlang@carltonfields.com)  
**Subject:** SJI: products liability subcommittee

Hello, products liability subcommittee members:

I hope you all are doing well and enjoying your summer so far. I have attached for your review the letter from Tom Hall, the Clerk of the Supreme Court, asking the committee to consider the Court's decision on our products liability report. The Court asks the committee to do further work on several of the instructions we proposed: 403.7, 403.11, 403.13, 403.14, 403.16, Model instruction 7, and the special verdict form. In addition, the Court asked us to review all of the products instructions to make sure they conform with the amendments the Court published in two decisions that issued after we filed the products report in January 2009—the book reorganization decision and the electronic devices decision. The referral letter asks us to file a new report with the Court by November 19, 2012.

Judge Barton asked me to chair the products subcommittee and get us working on our response. We are very fortunate that Gary Farmer, who lead the products subcommittee through the preparation of this report and remains extremely familiar with these issues, continues to serve as an ex officio member of our subcommittee.

On Tuesday afternoon, Judge Barton is planning to speak with Tom Hall to get further direction on a few issues. I think it would be a good idea to set up a conference call for our subcommittee for next week after Tuesday to discuss our approach and preliminary game plan. I attached my notes outlining what the different

instructions are so we can get a handle on how to best divide attack these issues. Please take a look at my list and think about whether any particular instructions are close to your heart so that you would like to take the lead in drafting.

So you have our proposed instructions handy, they are in appendix A to our products liability report. All of the materials filed in the products liability report are posted on the Supreme Court's website:

<http://www.floridasupremecourt.org/decisions/proposed.shtml#jurycivil>

Please let me know if you are available for a conference call any of these dates. I will try and choose the best time for everyone:

Wed. 6/20: 2 pm or 3:30 p.m.

Thurs. 6/21: 10 a.m., noon, or 2 p.m.

Fri. 6/22: 10 a.m. or 2 p.m.

Thanks very much. I look forward to working with you on this!

Rebecca

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**KWC&V**  
Kreusler-Walsh, Compiani & Vargas, P.A.

**Debra Gregory**

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**From:** Rebecca Mercier-Vargas  
**Sent:** Thursday, August 23, 2012 9:20 AM  
**To:** Elizabeth Russo; David Sales (david@salesappeals.com); (ctjujk1@ocnjcc.org); Laura Whitmore (Laura.Whitmore@arlaw.com); Gary M. Farmer (farmergm@att.net); gfox@stfblaw.com; Ralph Artigliere (skywayra@tds.net); twboyer@coj.net  
**Cc:** Barton, James ; Jodi B Jennings; jlang@carltonfields.com; lacone, Diane  
**Subject:** products liability subcommittee—transcript of May 5, 2010 oral argument  
**Attachments:** Fla Sup Ct OA - Products Liability Instructions (5.5.10) (00020957).PDF; chart - small group assignments (00020879).DOCX; image001.jpg

I hope you all are doing well. Just as a reminder, on September 7, we need the small groups drafting the defect, crashworthiness and inference instructions to circulate their drafts of these instructions. The full subcommittee will be discussing these drafts during a conference call at noon on Thursday, September 13. For your convenience, I have attached another copy of the chart listing the assignments for each small group.

The Supreme Court's oral argument on the products instructions was back on May 5, 2010. I found it helpful to watch the oral argument again. Here is the link to the oral argument if you are interested:

<http://wfsu.org/gavel2gavel/archives/flash/viewcase.php?case=09-1264>

The Supreme Court website posts a rough transcript of the oral argument on its website. In case it is helpful to you, I have attached the notes I jotted down on the transcript as I was listening. I tried to catch who was speaking and correct the major problems.

As a warning, the transcripts are not very accurate. Please don't rely on the transcript or my notes for a word-for-word guide on what was said. In particular, the transcript does not do a great job in capturing Wendy Lumish's presentation and I could not keep up with all the errors. Despite these problems, I thought the transcript might help jog your memory as to the major topics and concerns addressed at the oral argument.

Here is a rough index of the topics covered at the oral argument:

p. 1: Tracy Gunn speaking for the committee

p. 8: Larry Stewart—plaintiff's perspective

p. 9: 403.7 (definition of strict liability)

p. 16: 403.9 (definition of negligence)

p. 17: 403.11 (government rules)

p. 20: 403.16 (crashworthiness)

p. 21: 403.18 (defense issues) & 403.7 (definition of strict liability)

p. 28: Model Charges

p. 30 Wendy Lumish—defense perspective

p. 32: 403.7 (definition of strict liability)

p. 51: Dick Caldwell—defense perspective

p. 52: 403.9 (definition of negligence) & 403.10 (failure to warn) & 403.7 (definition of strict liability)

p. 62: Kathleen O'Connor—defense perspective  
p. 62: Government Rules instruction

p. 68: Tracy Gunn for the committee

If you prefer to print out a clean copy of the transcript so you can make your own notes, here is a link:  
<http://www.wfsu.org/gavel2gavel/transcript/pdfs/09-1264.pdf>

Rebecca

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>> PLEASE RISE.

HEAR YE HEAR YE HEAR YE THE  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION, ALL WITH A CAUSE TO  
PLEA, DRAW NEAR, GIVE ATTENTION,  
AND YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,  
THIS GREAT STATE OF FLORIDA, AND  
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

Justice  
Quince >> GOOD MORNING, AND WELCOME TO  
THE FLORIDA SUPREME COURT.

AND, ORAL ARGUMENT SECTION.  
THE FIRST CASE ON OUR CALENDAR  
IS STANDARD JURY INSTRUCTIONS IN  
CIVIL CASES.

THE PARTIES READY TO PROCEED?  
AND, YOU ALREADY HAVE DECIDED  
HOW YOU WILL DIVIDE UP YOUR  
TIME, CORRECT?

WHO WILL PROCEED FIRST?  
AND YOU'LL DO FIVE MINUTES AND  
FIVE MINUTES OF REBUTTAL.

>> YES.

>> ALL RIGHT.

Gunn >> MAY IT PLEASE THIS COURT  
GOOD MORNING, I AM TRACY GUNN  
AND HAVE THIS PLEASURE OF  
SERVING AS THE COURT CHAIR OF  
THE SUPREME COURT COMMITTEE OF  
STANDARD JURY INSTRUCTIONS IN  
CIVIL CASES AND WOULD LIKE TO  
TAKE A FEW MINUTES TO PRESENT  
THE BACKGROUND AND HOW IT  
DIFFERS FROM THE COMMITTEE'S  
USUAL SUBMISSIONS TO THE COURT.  
I HAVE WORKED WITH THE COMMITTEE  
FOR A NUMBER OF YEARS, FIRST, AS  
THE REPORTER, WHOSE JOB WAS TO  
TAKE THE MINUTES OF THE

Fla. Sup. Ct. OA  
Products Liability  
Instructions  
May 2010 (5/5/10)

Tracy Gunn  
for Products Comm.

COMMITTEE AND IN THAT CAPACITY I  
REVIEWED THE MINUTES OF THE  
COMMITTEE FOR MANY YEARS BEFORE.  
SO I'M VERY FAMILIAR WITH THE  
WORK OF THE COMMITTEE OVER A  
HISTORICAL PERIOD.

AND, I WOULD SAY THERE ARE TWO  
PRIMARY WAYS IN WHICH THESE  
PROPOSALS DIFFER FROM THOSE THAT  
USUALLY COME TO THE COURT.  
THE FIRST IS THE VAST MAJORITY  
OF THE COMMITTEE'S PROPOSALS  
USUALLY COME TO THE COURT AS A  
UNANIMOUS OR VIRTUALLY UNANIMOUS  
CONSENSUS POSITION OF THE  
COMMITTEE.

THERE USUALLY IS NOT A MAJORITY  
VIEW AND MINORITY VIEW AND NOT  
EVEN A VOTE TAKEN, THERE IS  
USUALLY A DISCUSSION UNTIL THE  
CONSENSUS IS REACHED.

AND, SECONDLY IN MOST CASES THE  
COMMITTEE WILL NOT PROPOSE A NEW  
INSTRUCTION OR A CHANGE TO THE  
INSTRUCTION UNLESS THERE IS THAT  
CONSENSUS, AND WILL ERR ON THE  
SIDE OF REMAINING SILENT AND  
WAITING FOR THE LAW TO DEVELOP  
AND HERE BOTH ISSUES ARE  
DIFFERENT THAN USUAL.

WE HAVE FOR THE PAST SEVERAL  
YEARS THREE DIFFERENT  
SUBCOMMITTEES WORKING ON THE  
ENTIRE JURY INSTRUCTION BOOK.  
AT THE SAME TIME.

THE BOOK REORGANIZATION  
SUBCOMMITTEE, HAS AND ~~EMOTIONS~~ *ERRORS + Omissions*  
SUBCOMMITTEE AND THE PLAIN  
ENGLISH SUBCOMMITTEE.

THE SUBCOMMITTEE SUBMITTED AND  
THE COURT APPROVED A WHOLESALE  
REORGANIZATION OF THE ENTIRE



REST OF THE BOOK BUT WHEN IT  
CAME TO THE PRODUCTS LIABILITY  
INSTRUCTION BOTH THREE GENERAL  
COMMITTEES AND THE PRODUCTS  
LIABILITY SUBCOMMITTEE  
IDENTIFIED A NUMBER OF ISSUES  
THAT WARRANTED FURTHER  
DISCUSSION ON THE SUBSTANTIVE  
ISSUES.

AND, FOR SOME OF THESE THE *reach*  
COMMITTEE WAS NOT ABLE TO ~~REFORM~~  
A CONSENSUS, AND AFTER YEARS OF  
DEBATE, LITERALLY YEARS... THE  
NEW DISCUSSION OF PRODUCTS  
LIABILITY BEGAN IN 2001.

THE MAJORITY OF THE MEMBERSHIP  
OF THE COMMITTEE CALLED FOR A  
VOTE AND THERE WAS A QUORUM OF  
THE COMMITTEE AND ATTENDANCE AT  
THE MEETING AND THE COMMITTEE  
WAS BOUND BY THE VOTE AND THAT  
IS AGAIN NOT OUR USUAL PROCEDURE  
BUT THE COMMITTEE AGREED A  
CONSENSUS WOULD NOT BE POSSIBLE  
AND WE HAD THE VOTE AND WE MOVED  
FORWARD WITH WORKING ON THE REST  
OF THE INSTRUCTIONS.

WE TOOK VOTES ON A NUMBER OF  
ISSUES AS WE WENT ALONG AND,  
SEVERAL OF THE VOTES WERE NOT  
UNANIMOUS.

BUT, ALL MEMBERS OF THE  
*worked*  
COMMITTEE WERE TOGETHER, AND  
ONCE THE DECISION HAD BEEN MADE,  
THE REST OF THE COMMITTEE *worked*  
ON THE NEXT ISSUE GOING FORWARD.

THIS IS AN EXTREMELY DILIGENT  
AND HARD WORKING COMMITTEE, WITH  
A MEMBERSHIP FULL OF EXPERIENCED  
LAWYERS AND JUDGES AND THERE WAS  
SPIRITED DEBATE AND INTENSE  
DISAGREEMENT WITH THE COMMITTEE

ON SOME OF THE ISSUES.

BUT --

J. Pariente > IS THAT BECAUSE THE LAW  
Q WASN'T SEEN TO BE SETTLED ON  
CERTAIN ISSUES.

>> YES.

J. Pariente WAS OPPOSED TO PEOPLE  
POSTURING?

Gunn >> I BELIEVE THAT THE PEOPLE WHO  
DISAGREED WITH THE ISSUES  
BELIEVED IN GOOD FAITH THAT THE  
LAW WAS UNSETTLED, YES, YOUR  
HONOR, AND A MAJORITY OF THE  
COMMITTEE AGREED THAT THE LAW  
WAS UNSETTLED, ABSOLUTELY.

J. Pariente AND WA -- WERE THERE CONCERNS  
IN SOME OF THESE AND WE'VE  
HIGHLIGHTED CERTAIN ONES.

Gunn >> YES.

J. Pariente >> THAT WILL BE DISCUSSED, THERE  
MIGHT BE POTENTIALLY A DEVIATION  
FROM WHAT THE LAW IS?

Gunn >> YES, YOUR HONOR, THERE IS A  
CONCERN ABOUT THAT.  
THE PROPOSALS AS SUBMITTED WERE  
APPROVED BY A MAJORITY OF THE  
COMMITTEE.  
THAT DOES NOT MEAN THEY WERE  
UNANIMOUS AND THE COURT ISSUES  
THE -- ISSUES THAT YOU HAVE  
IDENTIFIED ARE PRECISELY THE  
ISSUES ABOUT WHICH THERE WAS  
DEBATE ON THOSE QUESTIONS.

T. Lewis >> WE AT LEAST READ WHAT YOU  
SEND TO US.

Gunn >> SEE, IT IS THIS BIG, YOU READ  
WHAT WE SEND TO YOU AND  
VIRTUALLY EVERYONE ON THE  
COMMITTEE IDENTIFIED SOME ISSUES  
WHERE THEY WERE AT LEAST  
CONCERNED -- THERE WERE  
CONCERNS, IF NOT CONVINCED THE

INSTRUCTIONS EITHER DID NOT  
ACCURATELY REFLECT THE LAW, OR,  
AT A MINIMUM MADE A STATEMENT AS  
TO WHAT THE LAW WAS, WHEN THE  
LAW IN FACT WAS UNCLEAR AND WE  
HAD A LITTLE BIT OF A ~~CHECK-EN~~ chicken  
AND EGG PROBLEM, BECAUSE THE  
INSTRUCTIONS WERE AROUND FOR 20,  
30 YEARS, AND, WHEN WE WENT BACK  
TO LOOK AT THEM, WHEN THE THREE  
COMMITTEES WERE GOING, YOU KNOW,  
FINE TOOTHED COMB THROUGH THE  
WHOLE BOOK AND REVIEWING  
CITATIONS AND THE HISTORY OF  
THESE AND THE MINUTES...

Lewis >> LET ME SAY, I BELIEVE THE  
COURT REALLY UNDERSTANDS WHAT A  
GREAT JOB THAT YOUR COMMITTEE  
AND THE MEMBERS OF YOUR  
COMMITTEE HAVE DONE, AND THIS IS  
IN NO MEANS INTENDED AS  
CRITICISM OF THE COMMITTEE OR  
THE INDIVIDUALS, BUT, WE -- AS  
WE SAW THESE THINGS, I THINK THE  
MEMBERS OF THE COURT WERE  
CONCERNED THAT WE NEEDED TO  
REALLY FLESH THESE OUT A LITTLE  
BIT FURTHER AND BY NO MEANS, I  
MEAN, I THINK ALL OF US, TO A  
PERSON, THANK EVERY MEMBER OF  
THE COMMITTEE FOR ALL OF THE  
HARD WORK AND WE KNOW, BECAUSE  
THEY HAVE BEEN KEPT APPRISED AS  
YOU LET THE COURT KNOW.  
BUT AS WE START THROUGH THESE,  
LETS TAKE AN OVERVIEW, THERE ARE  
A LOT OF COMMENTS, IS IT NOT  
POSSIBLE TO -- FOR THIS COURT TO  
MAKE SOME SUGGESTIONS BASED ON  
THOSE COMMENTS, AND ASK THE  
COMMITTEE TO CONSIDER DOING X, Y  
OR Z.

Gunn >> WE'D GREATLY APPRECIATE THAT.

J. Lewis >> WE CAN CLARIFY SOME OF THE THINGS WE SHOULD DO.

Gunn >> AND, IN FACT YOU WILL SEE THAT THE COMMITTEE FRANKLY RECEIVED THE POINT WHERE WE WERE UNABLE TO REACH A CONSENSUS AND EVERYONE AGREED THAT WE NEEDED FURTHER GUIDANCE FROM THE COURT...

J. Lewis >> IT APPEARS FROM LOOKING AT THIS, EVEN IF YOU, JUSTICE PARIENTE I THINK WAS CONCERNED BECAUSE WE SEE AT TIMES, THAT SOMETIMES COMMITTEES BECOME PHILOSOPHICALLY INVESTED RATHER THAN INVESTED IN THE SYSTEM.

Gunn >> YES, YOUR HONOR.

J. Lewis >> AND AS WE LOOK THROUGH THIS, IT APPEARS TO ME, THAT THERE IS A FAIR CROSS-SECTION OF ALL DIFFERENT IDEOLOGIES IF YOU WANT TO CALL IT THAT THAT HAVE COMMENTED.

DO YOU THINK THAT IS TRUE.

Gunn >> YES, YOUR HONOR --

J. Lewis >> AND A LOT OF CONSISTENCY, FOR EXAMPLE ON THE MERGING OF THE STRICT LIABILITY AND SOME OF THOSE THINGS TOGETHER AND APPEARS BOTH SIDES ARE IN AGREEMENT THAT MAYBE THEY SHOULDN'T BE TOGETHER. AND, ALTHOUGH THE COMMITTEE MAY HAVE COME TO THAT CONCLUSION, IT APPEARS ON THE DESIGN DEFECTS AND PROPOSAL NUMBER NINE, IN MERGING THESE THINGS TOGETHER, THAT BOTH OF THOSE WHO DO DEFENSE WORK ON THAT ISSUE AND THOSE WHO PRESENT THE CLAIMS ARE SORT OF THE VIEW THEY SHOULDN'T

BE MERGED.

COULD WE NOT, IF THE COURT  
THINKS THAT THAT IS A CORRECT  
ANALYSIS, SUGGEST THEY BE  
SEPARATED AND, THE COMMITTEE CAN

--

Gunn >> ABSOLUTELY, YOUR HONOR AND  
THE EXISTING INSTRUCTIONS  
SEPARATE THEM, A MAJORITY OF THE  
MEMBERSHIP OF THE COMMITTEE  
VOTED TO COMBINE THEM.  
THAT WAS A -- AN ISSUE OF GREAT  
DEBATE WITHIN THE COMMITTEE AND  
THERE WAS A STRONG MINORITY VIEW  
OPPOSING IT.

AND...

J. Pariente > ARE YOU GOING TO SPEAK TO  
THAT?

THAT THIS IS FIRST ONE THAT  
RAISES... IN FACT THAT IS THE  
GUTS OF STRICT LIABILITY,  
GETTING IT RIGHT IS CRITICAL.

Pariente > ON BEHALF OF THE COMMITTEE --  
I DON'T UNDERSTAND WHAT THE  
BENEFIT IS, TO MERGING THEM WHEN  
YOU MIGHT HAVE MANUFACTURING AND  
DESIGN DEFECTS IN ONE CASE OR  
NOT.

WHAT WAS -- IS MR. STEWART GOING  
TO SPEAK TO THAT.

Gunn >> IF I CAN LET THE COMMENTATORS  
ADDRESS THOSE ISSUES, I WANTED  
TO GIVE THE COURT THE BACKGROUND  
AND LET THE COURT KNOW WHERE WE  
WERE AND IN TERMS OF GETTING --  
WE WORKED TO COMPRISE THE  
COMMITTEE WITH THE BALANCE  
BETWEEN BOTH SIDES AND THE COURT  
GIVING US AN ADDITIONAL  
OPPORTUNITY FOR COMMENTS.  
WE HAVE BROKEN THAT UP.

J. Quince > THE COMMITTEE ITSELF IS NOT

RECOMMENDING ANY CHANGES TO  
THEIR PROPOSALS, BASED ON THE  
COMMENTS.

*Gunn* >> THE COMMITTEE HAS MADE ITS  
PROPOSAL, BASED ON THE MAJORITY  
VOTE OF THE COMMITTEE.  
WE CERTAINLY ~~ASK~~ <sup>act at the discretion</sup> FOR THE  
~~INSTRUCTION~~ OF THE COURT AND  
WELCOME THE INSTRUCTION OF THE  
COURT ON REMAND.

*J. Canady* >> THE COMMITTEE HAS NOT HAD AN *consider*  
OPPORTUNITY TO ~~KID~~ THE COMMENTS  
FILED THIS YEAR BECAUSE THERE  
WAS NOT TIME BETWEEN WHEN THE  
COMMENTS WERE FILED AND WHEN YOU  
WERE ASKED TO RESPOND TO THEM.

*Gunn* >> YOUR HONOR, I -- THAT IS  
CORRECT.  
BUT, I BELIEVE THAT ON THE  
ISSUES THE COURT HAS IDENTIFIED,  
AND IT IS -- IN ITS NOTICE THEY  
WERE ALL MATTERS THE COMMITTEE  
PREVIOUSLY DECIDED AND THERE  
WERE A FEW ISSUES, INCLUDING THE  
NEW THIRD DCA CASE THE COMMITTEE  
COULD CONSIDER AND THE OTHER IS  
THE CHANGE OF THE COMPOSITION OF  
THE COMMITTEE AND MANY MEMBERS  
ROTATED OFF DUE TO TERM LIMITS  
AND UNFORTUNATELY, MANY OF THOSE  
MEMBERS WERE OUR MOST ACTIVE  
MEMBERS ON THESE ISSUES AND WE  
HAVE AN ENTIRELY NEW COMMITTEE,  
IT IS -- AND A THIRD OF THE  
COMMITTEE IS NEW NOW, SO... I'LL  
SAVE THE REST OF MY TIME FOR THE  
END IF THE COURT HAS FURTHER  
QUESTION AND MR. STEWART WILL  
SPEAK TO THE MERITS OF THE  
ISSUE.

>> THANK YOU.

MR. STEWART, ARE YOU NEXT?

*Larry Stewart*  
~~OCTOBER 25-26, 2012~~ *(AT perspective)*

OKAY.

*Stewart* >> I AM, YOUR HONOR.  
MY NAME OF COURSE IS LARRY  
STEWART

AND, I AM HERE FOR WHAT HAS BEEN  
DESCRIBED AS THE PLAINTIFFS'  
INTEREST, THOUGH THIS IS NOT AS  
YOU'RE WELL AWARE THE NORMAL  
CASE WHERE THERE IS A WINNER AND  
LOSER BELOW AND WE ARE ARGUING  
UP HERE AS ADVOCATES FOR WHAT  
THE LAW SHOULD BE.

THIS COMMITTEE PROCESS DEPENDS  
UPON, FOR ITS INTEGRITY,  
INTELLECTUALLY HONEST APPRAISAL  
OF WHAT THE LAW IS, AND NOT  
ADVOCACY, AT THE COMMITTEE  
LEVEL.

OUR COMMITTEE MEETINGS ARE NOT  
SUPPOSED TO BE CHARGE  
CONFERENCES.

>> LET'S...

>> CUT --

*J. Pariente* >> WE NEED TO GET TO 403 --

>> 403.7.

>> WHAT IS THE... IT MERGES *two together*  
TO... [INAUDIBLE] IS THAT

SOMETHING -- FLORIDA JUSTICE  
ASSOCIATION SAYS ONE THING AND  
YOU TRY A LOT OF PRODUCTS  
LIABILITY CASES, IS THIS A  
BETTER INSTRUCTION THAN WHAT HAS  
EXISTED IN THE PAST, AND DOES IT  
CONFORM TO THE LAW.

*Stewart* >> IT CONFORMS TO THE LAW IN ONE  
RESPECT AND ANOTHER RESPECT WE  
BELIEVE IT DOES NOT.

*BJP* >> AND THE BENEFIT IS...

*Stewart* RISK BENEFIT, WE BELIEVE, IS  
-- DOES NOT CONFORM TO THE LAW.

*BJP* >> WE'VE NEVER ADOPTED THE  
RISK-BENEFIT APPROACH.

403.7

THE COURT HAS NOT.

*Stewart* >> IT HAS BEEN DISCUSSED IN  
DICTA IN SOME DECISIONS BUT  
THERE HAS NEVER BEEN A HOLDING,  
ADOPTING RISK-BENEFIT AND AS A  
MATTER OF FACT, THIS COURT  
ADOPTED WEST, WHICH ADOPTED  
402-A WHICH HAS NO RISK-BENEFIT  
IN IT WHAT SO --

*Pariante* >> WITH THE MERGER, IS THAT IF  
YOU HAVE RISK-BENEFIT, THAT AT  
MOST PERTAINS TO A DESIGN DEFECT  
CASE AND DOESN'T PERTAIN TO A  
MANUFACTURING DEFECT CASE.

*Stewart* >> IT WOULD NOT PERTAIN TO A  
MANUFACTURING CASE.  
THAT IS CORRECT.  
BUT WE THINK IT SHOULD NOT BE  
PART OF 403-7 AT ALL.  
BECAUSE, RISK-BENEFIT REALLY IS  
A NEGLIGENCE TEST.

*Pariante* > SO, IF YOU TAKE THAT OUT, AND  
YOU SEPARATE THE INSTRUCTIONS  
BACK, WHAT IS DIFFERENT FROM  
WHAT EXISTED, I MEAN, WHAT IS  
WRONG WITH WHAT EXISTED?

*Stewart* >> THE ONLY THING THAT WAS WRONG  
WITH WHAT EXISTED WAS THAT IT  
INCLUDED RISK-BENEFIT.  
BECAUSE WHEN WE GOT INTO IT --  
>> I'M SAYING WITH WHAT EXISTED,  
IN THE CURRENT INSTRUCTIONS?

*Stewart* > IN PL-5.  
RISK-BENEFIT IS IN PL-5.

BECAUSE, WHAT HAPPENED, BACK  
WHEN THIS COURT DECIDED HILL IN  
1981 THERE WAS A FOOTNOTE IN  
HILL.

IN HILL, FORD MADE THE ARGUMENT  
IN THE HILL CASE THAT THERE  
OUGHT TO BE ONLY A NEGLIGENCE  
STANDARD FOR DESIGN DEFECT

← that asked the  
comm. to work  
on the instructions



Stewart

CASES.

THAT IS THE SECOND HALF OF THE HILL CASE.

THIS COURT REJECTED IT AND

SERVED STRICT LIABILITY APPLIES

TO BOTH MANUFACTURING AND DESIGN DEFECTS.

THAT WAS THE HOLDING IN HILL.

BUT, IN A FOOTNOTE IN HILL, IN

1981, THIS COURT SAID COMMITTEE

WE WANT YOU TO WORK MORE ON THE INSTRUCTION.

AT THAT POINT, THERE WAS NO

RISK-BENEFIT IN THE INSTRUCTION

WHATSOEVER.

PL-5.

THE COMMITTEE WENT BACK AND

SPENT AN ENTIRE YEAR WORKING ON

IT.

AND, THEY CHANGED THE

INSTRUCTION BY DEFINING WHAT WAS

THE TERM UNREASONABLY DANGEROUS.

BUT, THEN THEY GOT FORD'S BRIEF,

IN THE HILL CASE, WHICH WAS

ARGUING FOR RISK-BENEFIT TESTS

FOR DESIGN DEFECTS.

AND, USING THAT BRIEF, THEY

ADDED RISK BENEFIT INTO PL-5.

>> AND WHEN WAS THAT ADOPTED.

>> IN 1983.

>> SO, NOW, I GUESS, I SEE HOW,

SO, REALLY, CAN YOU TELL...

403.7, OTHER THAN MERGING THE

TWO, IS IT DIFFERENT FROM PL 4

AND 5.

>> IT IS NOT.

IT IS THE SAME AS PL 4 AND 5,

EXCEPT THAT IT PUTS THE TWO

TOGETHER.

>> BUT IF WE SEPARATE THEM BACK

OUT, IT IS IDENTICAL TO WHAT...

IT WOULD BE ESSENTIALLY

IDENTICAL TO WHAT WE HAD.

*J. Perine* > AND IT SEEMS LIKE YOU HAVE --  
SINCE WE HAVE HAD THIS IN, I  
ASSUME, THAT THE COURTS HAVE  
BEEN INSTRUCTING ON THE  
RISK-BENEFIT, SINCE WE HAD... I  
MEAN, IT ALREADY HAS BEEN IN THE  
INSTRUCTIONS AND WHEN HAVE WE  
REMOVED SOMETHING AFTER BEING IN  
THE INSTRUCTION FOR 25 YEARS,  
UNLESS WE CHANGE THE LAW ABOUT  
IT.

*Stewart* > ADOPTING AN INSTRUCTION IS  
NOT A STATEMENT FROM THE COURT  
ABOUT WHAT THE LAW IS.  
YOUR OPINIONS ALWAYS SAY THAT  
YOU ARE ONLY ARGUE PROVING IT  
FOR PUBLICATION.

*Perine* > YOU ARE NOT APPROVING IT AS --  
> I GUESS WHAT I'M ASKING, IT  
SEEMS IF WE WERE TO REMOVE IT  
WE'D BE MAKING A STATEMENT THAT  
SHOULD HAVE BEEN MADE AT THE  
TIME WE ADOPTED IT, WHICH IS  
THAT IS NOT WHAT THE LAW IS, NOW  
THAT I SEE IT IS IN PL-5 I'M  
LESS CONCERNED THAT IT IS IN  
THERE.

*Stewart* >> WELL, THE PROBLEM WITH IT,  
THERE ARE SEVERAL PROBLEMS WITH  
IT BEING IN PL-5.

FIRST OF ALL.

THERE IS A QUESTION OF WHETHER  
IT IS IN FACT THE LAW OF  
FLORIDA, WHEN HE IS IT EVER HAS  
BEEN ADOPTED.

AND I SUBMIT AND WE'VE ARGUED IN  
OUR PAPERS THERE IS NO CASE IN  
FLORIDA THAT HAS EVER ADOPTED  
RISK-BENEFIT.

THAT IS NUMBER ONE, AND, NUMBER  
2 IS, RISKS BENEFIT IS A

DIFFERENT THEORY, IT IS A  
NEGLIGENCE THEORY AND YOU HAVE A  
NEGLIGENCE THEORY PARKED IN THE  
MIDDLE OF THE LIABILITY  
INSTRUCTION AND THAT IS THE  
SECOND THING THAT IS WRONG AND  
THE THIRD THING IS WHEN THE  
COMMITTEE ADOPTED THIS IN 1983  
IT SAID IN THE NOTES, WE'RE NOT  
SAYING WHETHER IT IS RIGHT OR  
WRONG OR HOW THE TRIAL COURT  
SHOULD DECIDE WHICH TO GIVE AND  
EXPRESSION NO OPINION ON THAT  
WHATSOEVER A AND SO WHETHER A  
GIVE A CONSUMER PROTECTION TEST  
OR A RISK BENEFIT TEST, WE END  
UP WITH TRIAL COURTS GIVING BOTH  
TESTS, TO THE JURY.

IN THE SAME CASE ON STRICT  
LIABILITY.

SO, IN EFFECT WITHIN A STRICT  
LIABILITY INSTRUCTION, THEY GIVE  
THE STANDARD STRICT LIABILITY,  
CONSUMER EXPECTATIONS TEST, AND,  
A NEGLIGENCE TEST AT THE SAME  
TIME.

*Pariente* >>... EXPECT FOR THIS POSITION,  
WE ALWAYS SAY THAT WHEN WE ADOPT  
INSTRUCTIONS WE'RE NOT  
COMMENTING ON THE LAW.

IT SEEMS THAT YOUR ARGUMENT  
WOULD BE BETTER RAISED IN A CASE  
IN CONTROVERSY, AND THE COURT  
DECIDES THAT, WHETHER, GIVING  
BOTH ARE CONFUSING

I HAVE A PROBLEM, NOW THAT THE  
-- THAT I REAL LIE IT HAS BEEN  
IN THERE, FOR SAYING WE OUGHT TO  
MAKE A DECISION TO REMOVE IT.  
SO, JUST BECAUSE -- I KNOW YOU  
ONLY HAVE LIMITED TIME.

*J. Lewis* LET ME ASK ONE OTHER

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QUESTION, A FOLLOW-UP TO THAT.  
THE RISK-BENEFIT ANALYSIS, IS  
THERE AN ISSUE WITH REGARD TO  
WHETHER THAT APPLIES TO BOTH  
MANUFACTURING DEFECTS AND DESIGN  
DEFECT.

*Stewart* IT DOES NOT APPLY TO  
MANUFACTURING --

*Lewis* >> IF YOU COMBINE THEM, SYSTEM  
IT SHOULDN'T BE IN ONE, NO  
MATTER WHAT, THE WAY IT WAS  
BEFORE IT WAS IN THE DESIGN  
DEFECT AREA.

*Stewart* >> THAT'S CORRECT.

*J. Lewis* >> SO THAT UNDERSTOOD, IF YOU  
SEPARATE THEM IT WOULD ONLY GO  
INTO THAT AREA AND REMAIN WHERE  
IT WAS.

*J. Pariente* AND TO FOLLOW-UP, MAYBE WE  
ASK THE COMMITTEE, HOW DID THAT  
DEAL WITH THIS ISSUE THAT IT IS  
ABSOLUTELY CONFUSING AND COULD  
BE TO A TRIAL JUDGE IF THEY WERE  
COMBINED THAT WAY?  
I MEAN, WAS THAT DISCUSSION HAD?  
NOBODY I THINK WOULD INTEND  
AGAIN, A MANUFACTURING DEFECT,  
TO USE A RISK BENEFIT ANALYSIS.  
WAS SOMEONE TRYING TO ARGUE FOR  
THAT?

*Stewart* >> NO, YOUR HONOR.  
>> OKAY.

SO

*J. Pariente* >> BUT, YOU KNOW, AT THE  
*Stewart* COMMITTEE LEVEL, AND THIS IS IN  
THE SUBMISSION TO THE COURT, THE  
COMMITTEE, MAJORITY OF THE  
COMMITTEE, CERTAINLY, THERE WAS  
A DISSENTING VIEWPOINT OF SOME,  
BUT, THE MAJORITY OF THE  
COMMITTEE, WAS CONVINCED THAT IT  
WAS NO LONGER SATISFIED THAT

Stewart

THIS WAS A LAW IN FLORIDA.  
AND I THINK THE COMMITTEE'S  
OBLIGATION AT ANY POINT IN TIME,  
THAT IT FINDS THAT THERE IS AN  
INSTRUCTION, THAT DOES NOT  
EXPRESS THE LAW IN FLORIDA,  
WHETHER IT HAS BEEN THERE SIX  
MONTHS OR TWO DAYS OR 20 YEARS,  
IS OBLIGATED TO COME FORTH AND  
SAY, THIS INSTRUCTION IS  
INCORRECT.

J. Pariente  
Keep  
Stewart  
BUT THE MAJORITY -- DIDN'T  
THE COMMITTEE SUBMISSION  
SEPTEMBER IT IN THERE.

>> WHAT THE COMMITTEE DID IS  
THEY GOT TO THE POINT THAT THEY  
DECIDED THAT IT WAS NO LONGER  
SATISFIED THIS WAS THE LAW IN  
FLORIDA AND THEN THEY PUNTED.  
WE SAY THEY SHOULD HAVE GONE THE  
NEXT STEP TO BE INTELLECTUALLY  
HONEST AND TAKE IT OUT OF THE --  
403.7.

IT IS A NEGLIGENCE STANDARD THAT  
IS PART OF A NEGLIGENCE CASE,  
NOT PART OF THE STRICT  
LIABILITY.

>> STATEMENT TOWARDS ~~UNDER~~  
~~STRICT LIABILITY, ISN'T IT.~~

isn't risk Benefit part of  
the Restatement of Torts

BJP  
Stewart  
>> UNDER 402-A, IT IS NOT IN  
THERE WHATSOEVER, IT IS IN THE  
NEW RESTATEMENT THIRD, WHICH  
CAME OUT A FEW YEARS AGO.  
HIGHLY CONTROVERSIAL.  
AND THE IN RESTATEMENT WOULD  
ABOLISH 402-A AND WEST VERSUS  
CATERPILLAR AND WOULD BE IN NAME  
ONLY AND IS TOTALLY A NEGLIGENCE  
STANDARD -- IN NAME ONLY AND  
MOST SUPREME COURTS AROUND THE  
U.S. HAVE REJECTED IT, BUT WE  
SHOULDN'T BE ARGUING ABOUT THAT,

*Stewart*

BECAUSE THAT HAS TO COME, I  
SUBMIT IN A CASE IN CONTROVERSY  
ON WHETHER YOU WILL ADOPT THIS  
NEW RESTATEMENT, WHICH IS A  
TOTALLY DIFFERENT ANIMAL AND A  
VERY RADICAL ANIMAL.

*J. Poirier*

>> WHY DON'T WE GO ON TO 403.9,  
THE NEGLIGENCE...

>> CERTAINLY.

*J. Poirier*

IT HAS BEEN ASKED, WHERE DOES  
IT COME IN A PRODUCT BEING IN  
AND UNREASONABLY DANGEROUS  
CONDITION.

*Stewart*

>> IT CAME UP FROM AN ARGUMENT  
BASED UPON A DISTRICT COURT OF  
APPEAL CASES, WHERE THERE WERE  
INCONSISTENT VERDICTS OR WHERE  
THE COURT DECIDED THAT THERE WAS  
NO PROOF OF NEGLIGENCE AND IN  
THOSE OPINIONS, THERE IS  
LANGUAGE THAT SAYS IN THOSE  
CASES, THERE HAD TO BE PROOF OF  
BE A UNREASONABLY DANGEROUS  
PRODUCT BECAUSE THE CLAIMS IN  
THOSE CASES UNDER NEGLIGENCE AND  
STRICT LIABILITY WERE EXACTLY ON  
THE SAME FACTS.

AND, THIS WAS USED TO SUPPORT  
THE ARGUMENT THAT THIS SHOULD BE  
INSERTED IN THERE.

I THINK THE INSTRUCTION IS WRONG  
BECAUSE THERE ARE CASES WHERE  
YOU CAN HAVE A NEGLIGENCE CLAIM  
UNDER ONE SET OF FACTS, STRICT  
LIABILITY ON ANOTHER SET OF  
FACTS, AND, IF YOU APPROVE THIS  
INSTRUCTION, WHAT YOU ARE SAYING  
IS IN EVERY, SINGLE CASE, YOU  
CAN ONLY HAVE A NEGLIGENCE CLAIM  
IF YOU PROVE THAT THE PRODUCT  
WAS UNREASONABLY DANGEROUS WHICH  
IS TANTAMOUNT TO PROVING STRICT

403.9

LIABILITY.

BJP >> YOU WOULD JUST WANT TO US  
TAKE OUT THE ~~MOISTURE~~ THAT  
SAYS...

modifier

Stewart EXACTLY.

BJP >>... IT WOULD END WITH  
CIRCUMSTANCES.

Stewart EXACTLY.

IT WOULD BE THE TRADITIONAL  
NEGLIGENCE INSTRUCTION THAT THIS  
COURT ALREADY APPROVED.

J. Periente > 403.11, THERE WAS COMPLIANCE  
WITH GOVERNMENT RULES.

>> YES.

>> THAT IS NOT AN INSTRUCTION.  
IS THAT CORRECT?

Stewart > IT IS NOT AN INSTRUCTION FROM  
THE COMMITTEE.

THE COMMITTEE DID NOT SUBMIT AN  
INSTRUCTION ON THAT POINT.

WHAT HAPPENED WAS, THE PRODUCTS  
LIABILITY SUBCOMMITTEE APPROVED

AN INSTRUCTION, THAT STATUTE

467.-- WHATEVER IT IS, CALLED

THE -- STATUTE IS CALLED THE

GOVERNMENT RULES DEFENSE BUT

WHAT IT IS, A MIRROR IMAGE AND

SAYS IF THERE IS EVIDENCE OF

VIOLATION OF A GOVERNMENT RULE

THERE IS A PRESUMPTION OF

LIABILITY AND IF THERE IS

EVIDENCE OF COMPLIANCE THERE IS

A PRESUMPTION OF NO LIABILITY.

SO...

Periente >> FROM THE STATUTE.

Stewart >> FROM THE STATUTE.

WHAT THE STATUTE SAYS AND IS A  
PRESUMPTION, NOT AND IN FENCE,  
ACCORDING TO THE STATUTE.

THE SUBCOMMITTEE APPROVED  
INSTRUCTIONS BASED ON THE -- IT.  
WHEN IT GOT TO THE FULL

403.11

Government Rules

Stewart

COMMITTEE, WE GOT... YOU'LL SEE  
IN THE MINUTES, WE GOT WRAPPED  
UP IN A BIG ARGUMENT ABOUT  
WHETHER YOU INSTRUCT ON  
INFERENCES AND BUBBLES AND  
VANISHING THINGS AND ALL OF THE  
REST OF THE STUFF, AND THE  
COMMITTEE DECIDED NOT TO SEND UP  
THE INSTRUCTION THAT HAD BEEN  
APPROVE BY THE SUBCOMMITTEE.  
FOR OUR SIDE WE SAY THERE OUGHT  
TO BE AN INSTRUCTION AND OUGHT  
TO BE WHAT THE SUBCOMMITTEE  
APPROVED...

Pariente

>> SHOULDN'T IT HAVE -- IF IT  
WILL BE AN INSTRUCTION SHOULDN'T  
IT GO BOTH WAYS.

Stewart

>> YES.  
OH, YES.

AND IT DID GO BOTH WAYS, WHEN IT  
CAME OUT OF THE SUBCOMMITTEE IT  
WENT BOTH WAYS, THERE WAS THE  
VIOLATION SIDE, AND THERE WAS  
THE COMPLIANCE SIDE.

Canady

>> DID THE SUBCOMMITTEE ADDRESS  
WHETHER IT WAS A BURDEN SHIFTING  
PRESUMPTION OR VANISHING  
PRESUMPTION?

Stewart

>> WE DISCUSSED THAT AND  
EVERYTHING THAT YOU CAN IMAGINE,  
UP ONE SIDE AND DOWN THE OTHER.  
I DON'T THINK WE CAME TO ANY  
CONCLUSION ABOUT WHAT -- I TAKE  
THAT BACK.  
WE DID COME TO A CONCLUSION IT  
WAS NOT A VANISHING ANIMAL,  
BECAUSE YOU WOULDN'T GIVE AN  
INSTRUCTION ON IT IF IT WAS  
VANISHING.

SO, BY THE MERE FACT THAT WE  
SUBMITTED AN INSTRUCTION, WE HAD  
TO CONCLUDED THAT IT WAS NOT



VANISHING AND THERE'S -- THERE IS NOTHING IN THE STATUTE THAT WOULD INDICATE THAT IT IS VANISHING.

AND...

*+ the statute*

*J. Canady* >> ON ITS FACE IT SEEMED TO BE A  
*Stewart* DECLARATION OF PUBLIC POLICY.

>> THAT WAS THE SUBCOMMITTEE'S VIEW OF IT.

AND, THEREFORE WELL, HAD TO INSTRUCT ON IT.

THAT PARTIES WERE ENTITLED, WHICHEVER WAY IT FELL, PARTIES WERE ENTITLED TO HAVE AN INSTRUCTION ON IT.

WHETHER IT WAS A VIOLATION OR COMPLIANCE.

SO, THAT IS THE POSITION AS FAR AS THAT IS CONCERNED.

*St. P. Riente* > WHAT HAS BEEN HAPPENING ON THE GROUND, SINCE THE STATUTE HAS BEEN ADOPTED, FOR HOW IT IS

BEING APPLIED, ARE THERE ANY CASES FROM THE LOWER COURTS ON IT.

*Stewart* >> NOT THAT I'M AWARE OF AND NOT THAT WE HEARD OF IN OUR CONSIDERATION OF THIS, AT THE

COMMITTEE LEVEL.

Patient

TS

TELL ME, THE PRESIDENT'S BAR  
WANTS AN INSTRUCTION THAT SAYS  
COMPLIANCE WITH GOVERNMENT IS A  
PRESUMPTION OF NO LIABILITY,  
WITH COMPLIANCE WITH GOVERNMENT  
REGULATIONS?

Stewart >> WE WANT THE INSTRUCTION THAT  
SAYS VIOLATION OF THE RULES...  
[LAUGHTER].

>> WHAT'S GOOD FOR THE GOOSE IS  
GOOD FOR THE GANDER.  
THAT'S THE WAY IT FALLS OUT.  
I MEAN, YOU CAN'T HAVE ONE AND  
--

>> INSTRUCTIONS WERE GIVEN THAT  
SAID VIOLATIONS THAT THERE WAS A  
PRESUMPTION OF --

Stewart >> THERE IS, IN THE 401 GENERAL  
NEGLIGENCE, WHICH YOU HAVE  
ALREADY APPROVED, WE HAVE THE  
STANDARD INSTRUCTION ON  
VIOLATION OF A STATUTE,  
AND VIOLATION OF AN ORDINANCE,  
AND, THOSE DIDN'T CHANGE, THEY  
HAD BEEN IN THE INSTRUCTIONS FOR  
YEARS AND YEARS AND YEARS, AND  
ALL WE DID, AT THE SUBCOMMITTEE  
LEVEL, WAS TAKE THOSE  
INSTRUCTIONS AS A MODEL, AND  
CRAFT THE INSTRUCTION THAT...

Patient >> YOU AGAIN ARE BEING CANDID  
ABOUT THIS AND YOU AGREE, IT  
WOULD GO BOTH WAYS.

Stewart >> ABSOLUTELY.

I MEAN, YOU CAN'T HAVE IT ONE  
WAY AND NOT THE OTHER.

SO...

Patient >> THEN I GUESS CRASHWORTHINESS  
WAS THE OTHER SORT OF BIG ONE WE  
WERE CONCERNED ABOUT, SEEMED  
LIKE THERE WAS SOMETHING MISSING  
FROM THE INSTRUCTIONS THE WAY...

Stewart agrees presumption  
goes both ways -  
violation of Reg  
or compliance  
w/Reg.

403.16

Stewart

>> YOU ALL RAISED IT.

I DON'T THINK ANYBODY ON THE DEFENSE SIDE IS GOING TO COMMENT ON THAT TODAY.

BUT, WE MADE THE FLORIDA JUSTICE ASSOCIATION MADE A FEW SUGGESTIONS FOR SOME MINOR IMPROVEMENTS IN THAT INSTRUCTION I DON'T THINK THAT THEY ARE OR SHOULD BE VERY CONTROVERSIAL.

Pariente

> I GUESS WE WERE -- I KNOW MY CONCERN WAS, SHOULDN'T THERE BE CLARIFICATION... (INAUDIBLE) DEFECT CAUSED THE ORIGINAL ACCIDENT.

Stewart

> THAT IS ONE OF SUGGESTIONS THAT WE MADE TO PUT LANGUAGE IN THERE TO THAT EFFECT.

I CAN'T IMAGINE THAT THE DEFENSE WOULD OBJECT TO THAT.

WE ALSO SUGGESTED PUTTING A FOOTNOTE -- NOT A FOOTNOTE BUT A NOTE ON USE TO THE EFFECT,  
CLARIFY THAT THE FAULT OF THE OTHER PEOPLE ARE NOT AN ISSUE,  
IN THOSE CASES.

THAT WOULD GO IN AS A NOTE ON USE WHICH IS DIRECTLY OUT OF DAMARIO, AND...

Pariente

> I KNOW THE OTHER ONE, IT IS

403.18.

I DON'T KNOW, DID WE ASK YOU ABOUT THAT.

Stewart

> DEFENSE ISSUES.

YOU DID NOT ASK ME ABOUT THOSE.

Pariente

THE AFFIRMATIVE DEFENSE OF THE RISK-BENEFIT IS ADDED AS AN AFFIRMATIVE DEFENSE.

Stewart

>> CORRECT.

Pariente

>... WOULD BE USED.

>> WHY WOULD THAT BE USED.

she's asking whether under D'Amarico, the instruction should say that it does claim that  $\Delta$  caused the original accident

403.18

Defense Issues

>> WHY WOULD THAT BE USED?

*Pariente* >> WOULD THAT BE THAN A DEFENSE  
TO NEGLIGENCE OR TOO STRICT  
LIABILITY?

*Stewart* STRICT LIABILITY OR  
NEGLECTENCE.

*Pariente* >> SOON TO A DEGREE THAT WOULD  
AN APPROPRIATE PLACE TO TAKE IT  
OUT OF THE BURDEN.

*Stewart* >> CORRECT.

IT CAN'T BE BOTH.

IF YOU GO BACK AND LOOK AT ~~FOR~~ 402(A) <sup>cmt.</sup> (K)

~~TWO~~ A, COMMENTS K. IS

ESSENTIALLY A RISK-BENEFIT

DEFENSE UNDER 40 28.

THAT IS FOR AN UNAVOIDABLY

DANGEROUS PRODUCT WITH A

MANUFACTURER CANNOT MAKE IT

COMPLETELY SAFE AND GIVES PROPER

WARNING AND DIRECTIONS.

THIS COURT HAS WRITTEN AN  
OPINION AND VISCERAL CASE NOTING

THAT THIS IS AN AFFIRMATIVE

DEFENSE AND WE SAY THAT THAT

SUPPORTS PUTTING IT AS AN

AFFIRMATIVE DEFENSE AND NOT

PARTIS FOR A 3.7.

*Pariente* >> BUT THE COMMITTEE PUT IT IN  
BOTH PLACES.

*Stewart* >> ~~A PRETTY GOOD~~ <sup>the comm. put it in</sup> IN BOTH PLACES  
BECAUSE THEY WERE TRYING TO  
COVER THE WATERHOLE.

PUTTING IN BOTH BOTH PLACES OF

NOTE SAYING IS ONE OF THE OTHER

TRIAL COURT, YOU DECIDE YOUR YOU

HAVE TO DECIDE, TRUAX COURT.

YOU CAN GIVE ENDEARING PART OF

THE PLAINTIFF'S BURDEN AND ALSO

GIVE IT OVER HERE AS A DEFENSE.

*L. Quince* >> ARE THERE CASES THAT IS GONE  
BOTH WAYS THAT YOU PUT IT AS A  
PART OF THE -- NO?

Adams v. Searle  
576 So. 2d 728  
(Fla. 2d DCA 1991)

*Quince*

ON THE CASELAW IS AN AFFIRMATIVE  
DEFENSE?

*Stewart*

WELL, THEY'RE GOING TO ARGUE  
THYMIC PERMITTED DEFENSE THAT IT  
SHOULD BE IN 403.7.

I THINK WE BOTH AGREE IT DOESN'T  
GO BOTH PLACES.

Stewart

IN EITHER THOSE ONE OR OTHER.  
WE SAY THAT WHEN YOU READ 402 A,  
THE BURDEN IS ON THE DEFENDANT  
TO TO RAISE IT TO IMPROVE IT AS  
AN INTERPRETIVE DEFENSE.

You've been a lawyer for a long time +

Pariente

YAMAICHI TANK ASSEMBLIES FOR A  
LAWYER FOR A LONG TIME AND IN  
THE COURTROOM, I THINK THIS IS  
THE RECIPE FOR DISASTER PENDING  
FURTHER DEVELOPMENTS IN THE LAW  
TO THE LONGITUDINAL POSITION ON  
ONE OF THE RISK-BENEFIT IS THE  
STANDARD FOR PRODUCT DEFECT  
SHOULD BE INCLUDED IN 437 OR AN  
AFFIRMATIVE DEFENSE UNDER 43.18.  
AND THEN YOU SAY THEY SHOULDN'T  
INSTRUCT ON BOTH.

403.7

403.18

Stewart

>> THAT'S WHAT YOU GOT RIGHT NOW?  
UNDER PL FOUR ~~AND~~ FIVE.  
AN APPEAL FIBROCYSTIC AND HE  
TAKES NO POSITION ON WHETHER THE  
PROPER TEST IS TO EXPECTATIONS  
ARE RISK-BENEFIT.

use to Pl # does not take  
position on whether consumer  
expectations or risk-benefit  
is correct test

Pariente

>> WHAT THEY DO IS TO SET THEY  
JUST REPO.  
BUT WE DON'T HAVE IT RIGHT NOW  
IS THE LIMITED SENSE, SO TO  
FURTHER CONFUSE THE TRIAL  
JUDGES.

as an affirmative Δ

Stewart

>> ~~TO SHOOT~~ TAKEN IT OUT AND  
STRAIGHTEN IT OUT BEFORE 3.7.

that is why you should take it out  
of 403.7

Pariente

THEN YOU'VE GOT TO CASE LAW TO  
SUPPORT THAT.  
THEN YOU DON'T HAVE CASE LAW TO  
SUPPORT KEEPING IT IN FOR 3.7.

Stewart

>> COMING TO CASE THAT A PROCESS  
THAT SHOULD BE.  
>> THE SEARLE CASE.  
A RISK-BENEFIT IS AN AFFIRMATIVE  
DEFENSE.

Best case = Adam v. Searle

IF YOU LOOK AT 403 -- 402 A  
ADOPTED WITH COMMENTS K. IT'S AN

402 A cmt. K

Quince - is that a case out of this Court?

AFFIRMATIVE DEFENSE, WHICH IS

QUARTER TOP DID IN LAST.

Stewart ~~TO WESTERN SEARLE~~ <sup>say</sup> SEARLE IT'S AN  
AFFIRMATIVE DEFENSE AND NOT PART  
OF STRICT LIABILITY.

West + Adams v. Seattle

THERE'S ONE OTHER THING THAT  
THEY SHOULD NOTE AS PART OF THE  
DEFENSES UNDER 403.18 AND THAT

IS WHAT IS CURRENTLY IN THE  
INSTRUCTIONS AS I FORGET WHICH  
SUBPARAGRAPH IT IS, BUT IT'S  
CALLED STATE-OF-THE-ART DEFENSE.

~~JOEL~~ MAKES A GOOD ~~LINE~~ <sup>point</sup> IN HIS  
COMMENTS.

THAT IS NOT AN AFFIRMATIVE  
DEFENSE.

IT IS AN INSTRUCTION ON HOW THE  
CHERRY IS TO DEAL WITH THE  
EVIDENCE.

THERE'S NO BURDEN OF PROOF  
INVOLVED IN IT OR ISSUE INVOLVED  
IN THE ARID AND JOEL IS CORRECT.

IT HAS BEEN MOVED UP IN THE  
DEFENSE CAN BE A STANDALONE  
INSTRUCTION AT AN EARLIER POINT.

Pariente > SUBSECTION D. YOU SHALL  
CONSIDER THE CASE OF THE  
SCIENTIFIC AND TECHNICAL  
KNOWLEDGE IN OTHER CIRCUMSTANCES  
THAT EXISTED IN TIMES OF THE  
MANUFACTURER.

Stewart > CORRECT.  
IT'S NOT A DEFENSE, ALTHOUGH IF  
YOU LOOK AT THE STATUE, IT'S GOT  
THE TITLE OF THE STATUE.

Pariente > ~~I WAS PART OF THE PRODUCT~~  
~~VENDOR VIABILITY.~~

Stewart > IT OUT TO BE MOVED UP IN THE  
INSTRUCTIONS.

I THINK WORD SHOULD GO WITH <sup>403.15</sup> FOR  
IS RIGHT NOW.

Pariente > ~~I WOULD BE SOMETHING I WOULD~~  
THINK THE DEFENSE LAWYERS WOULD  
OBJECT TO.

THAT SEEMS LIKE A LOGICAL.

Stewart >> IT SEEMS LOGICAL TO ME.

NO OTHER DEFENSE INTERESTS HAVE  
COMMENTS ON THE TOTAL.

JOEL PRODDER UP IN HIS COMMENTS  
AND I THINK HE IS CORRECT

3

Joel Eaton

state-of-art is not  
an affirmative defense -  
it should be a  
stand-alone instruction

it would be part of the products  
liability instructions



..

I'M

>> HOW ABOUT THE INSTRUCTIONS  
THAT WOULD EMERGE MODELS SEVEN  
AND EIGHT INTO JUST ONE NUMBER  
SEVEN?

Prince  
Stewart >> THE COMMITTEE IS NOT ~~THE JUST~~  
~~THE TWO TOGETHER.~~

Advocating merging the two  
together

Stewart

THE COMMITTEE DECIDED CURRENT MODEL NUMBER SEVEN NOT TO BE UP IN IT BECAUSE IT'S JUST OUTDATED AND NOT USED ANYMORE.

IT'S AN EXPRESS WARRANTY INSTRUCTION AND THERE ARE VERY, VERY -- NOT THE COMMITTEE SAYING YOU SHOULD GET RID OF SEVEN AND EIGHT?

Pariente >> <sup>has a note,</sup> ~~KNOW~~, GET RID OF SEVEN HAVE AN UNLIMITED NUMBER EIGHT WHICH IS A ~~HAVEVILLE~~ OR CASE AND WE JUST PLUGGED IN THE NEW

Stewart INSTRUCTIONS AND NUMBER EIGHT. WE REALLY DIDN'T CHANGE ANYTHING OTHER THAN PUT THE NEW INSTRUCTIONS IN THERE.

SO WE'RE NOT MERGING, BUT WE'RE JUST GETTING RID OF WHAT REALLY IS AN OBSOLETE AT THE TRIAL JUDGES SAID THEY NEVER SEE THESE CASES ANYMORE AND RATHER THAN GO TO THE EFFORT OF REVAMPING THE ANGRY MODIFYING IT TO FIT THE NEW INSTRUCTIONS, WE JUST DELETE TODAY.

Pariente >> I HAVE A NOTE AND YOU MAY KNOW WHAT THIS REFERS TO, WHETHER IT ALTERS THE NOTES ABOUT WHETHER THE BYSTANDER MUST BE FORESEEABLE.

ISN'T THAT A CHANGE IN --

Stewart >> THAT IS NOT A CHANGE. IN YOUR CURRENT INSTRUCTIONS, IF YOU LOOK AT PL FIVE AND PROBABLY PL FOUR, TWO, THERE IS A PHRASE AND MANNER THAT COVERS BYSTANDERS AND IS COVERED IN THE NOTES.

THAT WAS TAKEN VERBATIM AND MOVED OVER TO THE NEW INSTRUCTIONS, NO CHANGE WITH THE

model<sup>4</sup> 7 = outdated express warranty so they deleted it - didn't make substantive

Bystander case change by submitting one model charge

lots of errors here not correcting

WEATHER.

IN THE NOTE ON USE, WE EXPANDED  
THE NOTE ON USE TO BE A LITTLE  
MORE DESCRIPTIVE OF THE  
BYSTANDER ISSUE AND WHAT THE  
COURTS HAVE SAID IN THE OPINIONS  
ABOUT IT.

BUT THERE IS NO CHANGE AS FAR AS

Stewart

5

BYSTANDER.

IN THE WEST, THIS COURT DECIDED THAT THE CLAIM WAS FOR BOTH INTERPARTY THAT WAS DIRECTLY USING THAT THING AND ANY BYSTANDER THAT WAS INJURED AS A RESULT OF IT.

SO BYSTANDERS HAVE ALWAYS BEEN PROPER CLAIMANTS IN STRICT PRODUCTS LAID THAT IT CLAIMS AND THERE'S BEEN NO CHANGE IN THE SUBSTANCE OF THE INSTRUCTION IN THAT REGARD.

THAT'S THE EXACT SAME LANGUAGE. >> WELCOME WAS CERTAINLY THANK YOU MR. STEWART FOR YOUR PRESENTATION HERE TODAY.

>> THANK YOU ARE A MATCH. DONATE SEVEN SECONDS OVER.

>> GOOD MORNING.

MAY PLEASE THE COURT, WENDY LUMISH FROM CARLTON FIELDS.

THANK YOU FOR THE OPPORTUNITY TO APPEAR TODAY.

I'M A SURVEY SAYING THERE'S SOME AGREEMENT.

WE AGREE ON THE SIDE OF THE ART INSTRUCTION THE QUESTION THAT WAS JUST ASK ACCRETION NOT BE ON THE DEFENSE SIDE SO MAYBE WE'RE MAKING SOME PROGRESS.

>> I ACTUALLY THINK THAT'S A HELPFUL THING FOR THE DEFENSE. I THINK THE CONFESSION IS SHOWING THE SUMMIT INTEREST AND JUST TRYING TO GET THE LAW INSTRUCTIONS THE WEBLOG IS.

>> EXACTLY ANYTHING THE WHOLE PROCESS DEMONSTRATES WHY IN THE TRIAL IN THE TRENCHES WAS AN HOURS UPON HOURS WORKING ON CHARGES IN PRODUCT LIABILITY

Wendy Lumish  
Δ perspective

Wendy Lumish

Pariente

Lumish

CASES AND HAVING TRIAL JUDGES TO  
HIGH DON'T UNDERSTAND, WHY IS  
THIS SO DIFFICULT?

I THINK THAT NINE YEARS AT LEAST  
THAT I LABOR ON THE COMMITTEE  
WITH OTHERS DEMONSTRATES THAT  
THESE REALLY ARE TOUGH ISSUES SO  
WE REALLY APPRECIATE THE

OPPORTUNITY TO BE ABLE TO COME  
BEFORE THE COURTS AND TRY TO  
CLEAR SOME OF THE SUB.

THE ISSUES THAT I'M GOING TO  
ADDRESS TODAY REALLY PRIMARILY  
TO PROPOSAL IT.

THE QUESTION OF THE PROPER TEST  
OF THE DESIGN CASE CAN BE  
INTERMINGLED IN A MANUFACTURING  
AND DESIGN, THE NOTE UNUSEFUL  
RELATING TO THE RESTATEMENT  
THIRD OF STEWART IN THE TWO  
ISSUE RULE AND I'LL REFER TO  
OTHERS TO ADDRESS THE NEGATIVE  
THINGS ISSUE IN MS. O'CONNOR  
WILL ADDRESS THE ISSUE ON THE  
PRESUMPTION.

AS FORMER MEMBERS --

>> LET ME ASK YOU THIS.

IS ANYONE GOING TO ADDRESS THE  
RISK-BENEFIT AND WHETHER OR NOT  
THAT IS REALLY, EXCUSE ME,

AFFIRMATIVE DEFENSE?

>> THAT'S ME.

I WILL DO THAT.

CERTAINLY AS A PRELIMINARY  
MATTER, MR. CUOMO AND I  
UNDERSTAND OUR WORLD TODAY IS  
NOT TO ARGUE WITH THE LAW SHOULD  
BE. *our role is*

~~LOVE~~ TO LOOK AT CASES AND  
INTERPRET THEM AND THAT'S WHAT I  
HOPE TO DO.

LET ME TURN FIRST HOPEFULLY TO A  
NOTE CAN CLEAR UP SOME ISSUES ON  
THE MANUFACTURING DEFECT ISSUE.  
IT JUST IS.

THE U.S. TO COUPLE QUESTIONS BUT  
TO ANSWER ON THAT *original*

FIRST OF ALL, THE DEFECT  
INSTRUCTION WAS CALLED PL FOUR  
AND THEN I'M INSTRUCTION IT SAID

*CE*

SIMPLY, IT PRACTICES  
UNREASONABLY DANGEROUS BECAUSE  
OF MANUFACTURING DEFECT IF IT  
DOES NOT CONFORM TO ITS INTENDED  
DESIGN FAILS TO PERFORM AS  
SAFELY AS THE INTENDED DESIGN  
WOULD HAVE PERFORMED.  
WE AGREE AND I THINK EVERYONE

Lumish

AGREES THAT IN THE MANUFACTURING  
DEFECT CASE THE RISK UTILITY  
TEST DOES NOT APPLY.

AND THE FOUR WERE INSTRUCTION  
SAID THAT.

WE BELIEVE THAT IT IS IMPORTANT  
TO SEPARATE THE TWO INSTRUCTIONS  
FOR THE REASONS EXPRESSED TODAY.  
IT IS A CONFUSING.

THEY ARE TWO DIFFERENT THEORIES.  
THE CASES RECOGNIZE THAT THEY'RE  
DIFFERENT THEORIES OF LIABILITY.  
THEY'RE DIFFERENT ISSUES THAT  
RELATE TO THE TWO AND PUTTING  
THEM TOGETHER AND TELLING A  
TRIAL JUDGE IF YOU MANUFACTURING  
DEFECT CASE QUANTITIES AND  
PICKUP HAVE DESCENDED THEN PLUG  
IT IN THERE, THERE'S ABSOLUTELY  
NO BASIS TO DO THAT.

AND SO OUR POSITION IS THAT THE  
COURT SHOULD RETAIN THE PL FOR  
CONSTRUCTION OF THAT WAS.  
NOW COME YOU ALSO ASKED THE  
QUESTION ABOUT IS THERE A CHANGE  
IN THE NEW INSTRUCTIONS IF WE  
JUST PULL OUT WHAT THE COMMITTEE  
HAS RECOMMENDED AND MOVE IT  
OVER, IS IT DIFFERENT?

AND THE ANSWER TO THAT IS YES IT  
IS DIFFERENT AND WE THINK IT'S  
DIFFERENT IN A SIGNIFICANT WAY.  
THE DIFFERENCES AS I MENTIONED

UNDER THE PRIOR VERSION THE  
QUESTION WAS THE JURY HAS TO  
DECIDE WHETHER CONFORM TO THE  
INTENDED DESIGN AND THEN *whether it would*  
~~WEATHERFIELD TO PERFORM AS~~  
SAFELY AS THE INTENDED DESIGN  
WOULD HAVE PERFORMED.

IN OTHER WORDS, IT WASN'T JUST  
ENOUGH THAT IT DIDN'T CONFORM.



umish

MAYBE PUT THE NOW A LITTLE BIT  
FURTHER OVER.

THAT WASN'T ENOUGH.

HE ALSO HAD TO SHOW THAT IT  
FAILED TO PERFORM AS SAFELY AS  
BEEN INTENDED DESIGN WOULD HAVE  
PERFORMED.

THE NEW INSTRUCTION IS PROPOSED

new instruction

Lumish

8

IN THE KNOW TO USE WHEN INSTEAD  
PUT AN END WOULD READ A PROJECT  
IS UNREASONABLY DANGEROUS IF THE  
PRODUCT WAS NOT BUILT ACCORDING  
TO ITS INTENDED DESIGN.  
OR BECAUSE IT FAILED TO PERFORM  
AS SAFELY AS AN ORDINARY  
CONSUMER.  
SO UNDER THE NEW PROPOSED  
INSTRUCTION.

Patient

Lumish

>> ARE WE TALKING ABOUT 40317?  
>> YOU HAVE TO GO TO THE NOTE  
UNUSEFUL OR TO GET THE LANGUAGE  
FOR MANUFACTURING DEFECT CASE  
WHICH IS OUR PROBLEM.  
IF YOU ARE TELLING PEOPLE YOU  
HAVE TO GO TO A NOTE ON USED ~~WEB~~  
LANGUAGE, WHY NOT KEEP THEM  
SEPARATE?  
AND SO MY POINT IS, SEPARATE  
THEM FOR ONE AND TO ANSWER YOUR  
QUESTION IS, WAS AT THE SAME?  
KNOW, THE PROPOSAL ON THE TABLE  
WHEN YOU PULL UP A NOTE UNUSEFUL  
AND NOW IS GOING TO GIVE YOU A  
DIFFERENT INSTRUCTION THAN WHAT  
WAS PREVIOUSLY PROVIDED.

Lewis

>> LET ME MAKE SURE -- I MEAN, I  
UNDERSTOOD THAT THE COMMENTATORS  
WERE THE MAJORITY AGREE THE  
SHOULD BE SEPARATE.

Lumish

THERE'S AGREEMENT ON THAT POINT.  
>> WELL, I THINK THAT ALL OF THE  
COMMENTS QUOTE UNQUOTE DEFENSE  
COMMENTS WHERE THEY SHOULD BE  
SEPARATED ~~YOUR TOOL EAT IN~~ WAS A  
MEMBER OF THE COMMITTEE AT THE  
TIME AND 2004, WE CHANGED THE  
MANUFACTURING DEFECT  
INSTRUCTION.  
HE WAS ON THE COMMITTEE AT THAT  
TIME AND AGREE TO THAT LANGUAGE.

Joel Eaten

FJA

I BELIEVE ~~BE~~ JA AND

MR. STEWART'S COMMENTS AS WELL  
AS JUDGE FARMER'S SUGGESTED THEY  
SHOULD BE ONE INSTRUCTION MERGE  
TOGETHER.

Quine >> I DIDN'T HEAR THAT THIS  
MORNING.

I HEARD THAT THIS MORNING THEY

SHOULD NOT BE COMBINED.

AND MY --

9

*Lumish* >> AS I UNDERSTAND IT, (BF JA, *FJA*)  
MR. STEWART AND JUDGE FARMER  
BELIEVES THEY SHOULD BE COMBINED  
IN ONE INSTRUCTION.

MR. STEWART, MYSELF ARE ALL OF  
THE COMMITTEE NOW.

>> I'M THINKING THE COMMENTS WE  
RECEIVED, *FJA* SAID IT WOULD  
MAKE A CONFUSING.

AND I THOUGHT THAT'S WHAT HE  
SAID.

*Lumish* >> I MAY HAVE MISUNDERSTOOD.

*Lewis* >> YOU'RE CLEARLY ON THE RECORD  
AS SAYING THEY SHOULD BE  
SEPARATE.

*Lumish* THEY SHOULD BE *separated* ~~SEPARATED~~ AND  
IT'S WRONG.

*Pariante* >> IF THEY'RE SEPARATED, SHOULD  
THEY BE DIFFERENT THAN WHAT IS  
NOW TL FOR AND FIVE? *PL 4 was*

*Lumish* > IN MY OPINION ~~PEEL FOUR WITH~~  
A CORRECT STATEMENT OF THE LAW  
AND HE CANNOT BE CHANGED HERE AT  
A HOTEL YOU THAT THE POSITION OF  
MANY ON THE OTHER SIDE IS THAT  
IT DIDN'T ACCURATELY REFLECT THE  
LANGUAGE ABOUT THE CONSUMER *expectation*  
~~EXPECT HAITIAN TESTS.~~

IF THAT FAILS TO PERFORM AS  
SAFELY AS THE INTENDED DESIGN  
AND THERE WERE THOSE BELIEVE  
THEY SHOULD INSTEAD DAY AS  
SAFELY AS THE ORDINARY CONSUMER.  
I WOULD SUBMIT THAT IF YOU  
CHANGE IT SO THAT THERE IS AND  
AND AND THERE IS A REQUIREMENT  
NOW THAT THE PRODUCT DOES NOT  
BUILD ACCORDING TO DESIGN GO TO  
PERFORM AS SAFELY AS YOUR  
ORDINARY CONSUMER I THINK THAT'S

*PL 4 was correct*

*could modify to:*

- ① not built to intended design and*
- ② not as safe as ordinary consumer would expect*

*Wm*

A CORRECT STATEMENT.

SO I WOULD HAVE NO PROBLEM WITH  
THE CURRENT INSTRUCTION WERE  
MODIFIED SLIGHTLY AS LONG AS THE  
INDUSTRY BEEN THERE.

>> IT DOES NOT CONFORM WITH THE  
INTENT DESIGN AND A SALES REFORM  
AS SAFELY AS THE INTENDED DESIGN

WOULD CONFORM YOU WOULD AGREE  
THAT IT SHOULD BE SUBSTITUTED  
WITH THE CONSUMER EXPECTATIONS?

*Lomish* > I THINK THE PL FOUR AS IT  
STANDS IS FINE, BUT I WOULD HAVE  
NO PROBLEM WITH CHANGING THE  
LANGUAGE AS THE SECOND PART OF  
THE CADETS AT THE CORE BELIEF  
CONFORMS.

BUT I THINK AS IT STOOD THAT WAS  
FINE.

>> THAT'S THE PROPOSAL AS A  
PRODUCT FAILS TO PERFORM AS  
SAFELY AS AN ORDINARY CONSUMER  
EFFECT WHEN USED AS INTENDED OR  
USED IN A MATTER REASONABLY  
INTENDED IT TO CREATOR.

*Lomish* >> NOTABLY <sup>(6B)</sup> THOUGH THE MAJORITY  
PUT AN OAR IN THERE AND WERE  
SAYING IT HAS TO BE AN AND.  
OKAY, IT GETS A LITTLE  
COMPENSATED, BUT THE POINT --

~~>> WE SHOULD SEND A PURIST~~  
~~COMMENT HE COOMASSIE, D.~~

*Joke BGP*

*Lomish* > WE DID THAT WHEN BILL WAGNER  
WAS THE CHAIR THE SUBCOMMITTEE  
SHE IS TO GIVE US THE CHECK OUT  
AND WE STILL COULDN'T AGREE.  
THE OTHER QUICK POINT TO MAKE ON  
THE MANUFACTURING DEFECT ISSUE  
IF THERE IS A NOTE ON USED ONE  
THAT TALKS ABOUT SEEKING  
IMPROVED.

WE THINK THAT THAT'S AN  
APPROPRIATE IN A JURY  
INSTRUCTION TO TALK ABOUT  
LEADING A PROOF REQUIREMENTS IN  
ADDITION TO THAT WE BELIEVE  
THAT'S AN INCORRECT STATEMENT.  
WE DETAILED THAT IN OUR  
SUBMISSION.

AND SO WILL LEAVE IT AT THAT FOR

THE MOMENT SOMEONE TO TALK ABOUT  
THE DESIGN DEFECT RISK UTILITY  
TEST I THINK THAT THE OTHER  
ISSUE OF CONCERN TO THE COURT.  
WE BELIEVE THAT THE NEW  
INSTRUCTION IS CORRECT.  
IT INCLUDES BOTH TESTS.  
IT REFLECTS ~~TL~~ FIVE AS IT WAS

PL

Lewis

BEFORE.

11

SO WE HAVE NO PROBLEM WITH THE INSTRUCTION.

OUR PROBLEM IS WITH THE NOTE ON USED IN TWO RESPECTS.

THE NOTE ON YOU SUGGEST THE RISK UTILITY TEST IS NOT A TEST OF A DEFECT IN THAT IT'S AN AFFIRMATIVE DEFENSE.

LET ME START WITH THE AFFIRMATIVE DEFENSE.

MR. STEWART SAID IT WAS A SUPREME COURT CASE.

Adams v. Searle

IT WAS A SECOND DCA CASE.

IT FELT VERY SPECIFIC WAY WITH COMMENT K., WHICH IS UNAVIDABLY UNSAFE PRODUCTS, A VERY NARROW CATEGORY OF AUDIT, NOT THE NORM.

SO THE SUGGESTION THAT I.T.

SUPPORTS THE NOTION THAT ANY PRODUCT LIABILITY CASE THE RISK UTILITY CASE IS AN AFFIRMATIVE

DEFENSE I SUBMIT THAT THE INCORRECT AND NOT SUPPORTED BY FLORIDA LAW.

NO CASE HOLD THAT IT'S AN AFFIRMATIVE DEFENSE.

THE REST OF THE STORY RELATING TO THE RISK UTILITY TEST IS A TEST OF DEFECT, OUR PROPOSAL

WHAT I WOULD SUBMIT IS

APPROPRIATE IS TO RETAIN THE 2

CURRENT COMMENT ~~WHICH BASICALLY~~

SAYS HERE'S BOTH A PENDING

FURTHER DEVELOPMENT WE CAN'T

TELL YOU WHICH ONE TO USE AND

WHEN TO USE IT.

>> WELL, LET'S GO BACK.

I THINK THERE YOU COULD HAVE DIFFERENT INSTRUCTIONS AND EVERY DISTRICT, EVERY CIRCUIT THAT'S DIFFERENT.



Lewis

IS THERE A CASE THAT IS THAT  
THERE IS SOME FORM OF  
RISK-BENEFIT PROOF THAT IS  
REQUIRED BEFORE AS A CONDITION  
PRECEDENT TO A DESIGN DEFECT  
VERDICT?

Wmids >> I BELIEVE THERE ARE MULTIPLE  
CASES IN FLORIDA TO SUPPORT THE

USE OF RISK-BENEFIT TEST.

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Lewis

>> I DIDN'T SAY THAT.

THE ANSWER IS I ASK IT.

I UNDERSTAND THERE'S A LOT OF CASES THAT TALK ABOUT A LOT OF DIFFERENT THINGS.

IS THERE A CASE THAT SAYS

Burden

~~THERE'S A PROOF OF WOMEN~~ WITH REGARD TO THE RISK-BENEFIT CONCEPT AS PART OF YOUR BURDEN OF PROOF IN PREVAILING ON A DESIGN DEFECT CASE?

Lumish

>> I THINK FRAMED IN THOSE EXACT WORDS, NO.

Lewis

>> THAT THE PROBLEM WOULD GET INTO BECAUSE YOU'RE SAYING IT'S NOT THE AFFIRMATIVE DEFENSE.

THEY'RE SAYING IT'S NOT PART OF AN ELEMENT ~~IS CLEAR~~ *of the claim*

IT SEEMS TO ME IS PROBABLY

NEITHER ONE.

IF THERE'S NOT A CASE THAT HOLDS

It's ~~AS ONE OR THE OTHER~~, THEN IT SOMETHING ELSE.

IT'S NOT BEEN <sup>IN</sup> INSTRUCTED ON PART OF A CLAIM OR DEFENSIVE BURDEN.

Lumish

>> WELL, WHAT I WOULD SAY IS THERE TO CASES FROM THE FORDYCE IN COURT.

THE AUBURN CASE WHICH THERE'S BEEN NO DISCUSSION ON IRRADIATION TECHNOLOGY.

IN BOTH CASES THE ISSUE WAS NOT DIRECTLY WHAT THE TEXT OF DESIGN DEFECT IN FLORIDA WHICH IS WHY IS IT THE QUESTION KNOW WHEN YOU ASK THAT.

HOWEVER, BOTH CASES LOOK AT THE QUESTION OF WHAT DOES

UNREASONABLY DANGEROUS AND AS AN ELEMENT OF STRICT LIABILITY 402

A.

no case ~~for~~ holding risk of liability is an element

cites

Ford v. Force

Auburn Machine

Radiation Technologies

BECAUSE REMEMBER 402 A SELLS A  
PRODUCT IS DEFECTIVE AND  
UNREASONABLY DANGEROUS.  
IT DOESN'T BEEN DEFINED WHAT  
UNREASONABLY DANGEROUS IT.  
AND THE AUBURN CASE THEY WERE  
DECIDING WHETHER OR NOT TO ADOPT  
THE ~~PATTERN~~ DANGER EXCEPTION AS

*patent*

THE DEFENSE AND THE COURTS DO NOT AGREE WITH THE QUESTION IS WHETHER OR NOT THE PRODUCT IS UNREASONABLY DANGEROUS. WE'RE GOING TO USE THE RISK UTILITY TEST AND NOT HOW YOU EXPLAIN WHY A KNIFE IS NOT DEFECT DID EVEN THOUGH IT COULDN'T HAVE BECAUSE IT DOESN'T HAVE AN UNREASONABLE DANGER. FOLLOWING THAT, THIS COURT IN RADIATION TECHNOLOGY WAS ASKED TO LOOK AT WHETHER OR NOT A PRODUCT WAS INHERENTLY DANGEROUS IF IT DID NOT CAUSE INJURY TO A PERSON.

WHAT THE COURT HELD IN MY CASE WAS INHERENTLY DANGEROUS IS REALLY A QUOTE UNQUOTE PASSÉ CONCEPT IN THE CONTEXT OF NOW STRICT LIABILITY UNDER 402 A AND THEY SAID BALANCING TEST TO FIND UNREASONABLY DANGEROUS. AND IN THAT CASE THEY FOLLOWED THE AUBURN CASE.

SINCE THAT TIME, MULTIPLE DISTRICT <sup>courts</sup> WORTH OF LOOKED AT THIS ISSUE IN SOME CONTEXT AND HAVE TOO RECOGNIZED THE RISK UTILITY TEST.

LIKE VERSUS MULDER WITH A SUMMARY THEY LOOKED AND SAID THERE IS A FACT ISSUE ON CONSUMER EXPECT PATIENT.

>> WHAT'S HAPPENING BASICALLY <sup>yo</sup> SAID HE SPENT A LOT OF TIME AT THE JURY INSTRUCTION.

Are our JUDGES INSTRUCT THEM USING BOTH THE CONSUMER EXPECTATION AND THE RISK-BENEFIT?

>> IN MANY CASES, THEIR USE OF BOTH.

*Lumish*

AS THE COURT CENSURE OVER THE  
RISK UTILITY TEST AND IT WAS  
REVERSED AND IN MY CASE THE  
COURT COURT HELD THAT POST HAS  
SHOULD HAVE BEEN INSTRUCTED.  
AGAIN SUGGESTED THE RISK UTILITY  
TEST DOES ONE TEST.  
TO BE CLEAR, I'M NOT SUGGESTING

*Lomish*

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THE LAW'S CLEAR THIS AREA.

IF YOU WERE WE WOULDN'T BE  
DEBATING IT FOR NINE YEARS OR  
MORE.

THE POINT DO WE MAKE IS THE  
CURRENT COMMENT SAYS THAT THERE  
ARE TWO TESTS AND HERE ARE SOME  
CASES THAT ADDRESS THE.

THIS WHOLE DEBATE STARTED INTO  
COMMITTEE AFTER THE FOURTH CASE  
BECAUSE I RECOMMENDED UP A POINT  
THAT WE NEED TO ADD THAT IT'S  
ANOTHER CASE ADDRESSING THE  
ISSUE.

*Force v. Ford*  
*adding a note*

AND I THINK THAT THE BEST  
SERVICE WE CAN DO TO THE BENCH  
BAR NOW IS TO JUST PUT A STRING  
SITE TO ALL OF THE CASES AND LET  
THE LITIGANTS FIGHT IT OUT IN  
THE CONTEXT OF A PARTICULAR  
CASE.

OR IS THOUGH BLACK BUTTERFLY IN  
TERMS OF THIS TESTIFIES IN THIS  
CASE, THIS APPLIES IN THAT CASE.  
MAYBE THERE WILL BE WHEN THE  
APPROPRIATE CASE COMES BEFORE  
THE COURT.

UNTIL THAT TIME FOR THE COMMENTS  
TO SUGGEST BUT IT'S ONE OR THE  
OTHER, THE LAW DOES NOT  
SUPPORTED WE THINK WILL CAUSE  
CONFUSION WITH ABSOLUTE AND  
NECESSARY IN A CIRCUMSTANCE  
WHERE LITIGANTS HAVE BEEN GOING  
THROUGH.

*Patient* >> TAKE EITHER PART OF THE CLAIM  
WITH YOU FOR IT IS. *an affirmative defense*

*Lomish* >> I THINK IT'S CLEAR THE ONLY  
CIRCUMSTANCE THAT MIGHT BE  
CONSIDERED IN THE DEPARTMENT *An Affirmative*  
DEFENSE UNDER ADAMS IS A COMMENT *(K)*  
CASE WHICH IS A SPECIFIC CASE *402A, cmt K*

INVOLVING AN UNAVOIDABLY UNSAFE  
PRODUCTS

THE NORMAL CIRCUMSTANCE.

>> IN A DESIGN CASE.

SO AT LEAST FOR AN AGREEMENT  
THEY ARE.

IT DOESN'T APPLY IN THE  
MANUFACTURING CONTEXT.

SO WERE MAKING SOME PROGRESS.

*Lumish* >> I'M SORRY AND WE DO AGREE ON THAT.

IF THERE IS AN EXCEPTION AND ALL IN THE RISK UTILITY TEST AS A DEFENSE AND I DON'T CONCEIVE IT'S EVER HAD TO WOULD BE IN THE CONTEXT OF COMMENT K. IN THE AFFIRMATIVE DEFENSE OF ME TO SAY THAT.

BUT THAT DOESN'T CHANGE THE ISSUE OF WHETHER THE RISK UTILITY TEST IS ONE OF THE TEST THAT HAS BEEN CITED IN CASES IN FLORIDA.

AND WE BELIEVE THAT THE CURRENT COMMENT WHICH SAYS THAT PENDING FURTHER DEVELOPMENT HERE ARE SOME CASES, WE BELIEVE THAT'S APPROPRIATE.

RIGHT NOW IT SAYS THESE CONCEPTS ARE DISCUSSED IN AND RIGHT NOW IT'S RADIATION IS CC ~~ANONYMOUS~~ + Adams

WE THINK THE ONLY THING WE SHOULD DO IS ADD THE OTHER NAME CASES DO IT AND ADDRESS IT.

I KNOW I'VE OVERPECK MAKE ONE MORE QUICK POINT THERE'S A NOTE ON NEW SPORT RELATING TO THE RESTATEMENT THIRD.

OUR ONLY POINT, DISTANCE THE TIME THE COMMITTEE ADDRESSED THE ISSUE, ANOTHER CASES, THE THIRD DISTRICT THAT ACTUALLY DOES RECOGNIZE THE RESTATEMENT. WE THINK IT NEEDS TO BE REFLECTIVE OF THE NEWER DECISION.

I'M NOT SUGGESTING THE RISK UTILITY HAS BEEN ADOPTED BUT HE NEEDS TO CORRECTLY REFLECT TO CASES HEAR THE COMMENTS OPPOSING

3D DCA has recognized Post. third since Committee submitted its materials - need to update note at a minimum



IT SAYS ITS OUTLIER.

IT IS NOT FOR THIS COMMITTEE TO  
DECIDE WHICH CASES AN OUTLIER IN  
WHICH CASE IT'S NOT.

>> THANK YOU VERY MUCH FOR YOUR  
PRESENTATION.

MR. CALDWELL.

>> MAY PLEASE THE COURT.

Dick  
Caldwell

Caldwell

MY NAME IS RICHARD CALDWELL.

I WILL ADDRESS THE NEGLIGENCE  
ISSUES AND PROPOSALS 10 AND 11.

THE PRIMARY PROBLEM THAT'S  
PRESENTED ABOUT A PROPOSED  
INSTRUCTION 403.9, THE  
NEGLIGENCE INSTRUCTION AS IT  
FAILS TO MENTION THE JURY MUST  
FIND THAT THE PRODUCT IN  
QUESTION IS DEFECT GAVE.

AND THE SAME CLAUSE IS PRESENT  
IN THE INSTRUCTION 403.10 OF THE  
FAILURE TO WARN AND IN THE NOTE  
ON USE ONE.

NOW SUPPORT FOR MY PROPOSITION  
I REALLY CAN'T DO ANY BETTER  
THAN TO QUOTE THE WORDS OF THIS  
COURT FROM WEST VERSUS  
CATERPILLAR.

West

WHICH SAID AT THE HEART OF EACH. theory  
THAT IS NEGLIGENCE OR STRICT  
LIABILITY IS THE REQUIREMENT  
THAT THE PLAINTIFFS INJURY MUST  
HAVE BEEN CAUSED BY SOME DEFECT  
IN THE PRODUCT AND INTERESTINGLY  
DEFECT IS CAPITALIZED IN THE  
OPINION.

GENERALLY WHEN THE INJURY IS  
NOWHERE TRIVIAL TO THE DEFECT IS  
NO BASIS FOR IMPOSING PRODUCT  
LIABILITY UPON THE MANUFACTURE  
AND THEY CITE THE ROYAL VERSUS  
BLACK & DECKER MANUFACTURING  
CASE WHICH WAS ALSO CITED IN OUR  
COMMENT.

I STUDIOUSLY AVOIDING THE WORD  
DEFECT IN THE PROPOSED  
INSTRUCTIONS, 403.9 M. 403.10  
DAY STATE LAW BY ATTEMPTING TO  
DIVORCE TO MAKE WHAT SHOULD  
CONCEPT UNDER DISCUSSION HERE  
FROM THE VERY ESSENCE, THE VERY

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Dick Caldwell  
△ perspective

BASIS OF PRODUCT LIABILITY LAW,  
WHICH IS THAT THERE MUST BE A  
DEFECT.

AND THE SAME PROBLEM WITH THE  
DAILY SPILLS OVER INTO 43.15,  
THE ISSUES.

*Lewis* >> IF WE VIEW IT FROM THAT  
PERSPECTIVE, YOU'RE BASICALLY

ARGUING ALL NEGLIGENCE AND  
STRICT LIABILITY CONCEPTS SHOULD  
BE PRESENTED TOGETHER.

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*Caldwell* NO, SIR.

THEY ARE DIFFERENT.

*Lewis* >> I WAS UNDER THE INFLUENCE  
THIS WAS A STRICT LIABILITY  
CASE.

*Caldwell* > OF COURSE THEY DECIDED TO DO  
THAT.

BUT IN SO DOING THE COURT USED  
THE LANGUAGE THAT I JUST QUOTED  
IS PART OF THE RATIONALE FOR THE  
ADOPTION OF STRICT LIABILITY.

*Lewis* >> WHAT IS THE INSTRUCTION SET  
AND NEGLIGENCE WITH REGARD TO  
PRODUCT BETWEEN WEST AND EAST  
PROPOSALS?

*until these*

*Caldwell* >> THERE WAS NO NEGLIGENCE  
INSTRUCTION PRODUCTS.

*Lewis* >> WHAT WAS THE PRACTICAL --

*Caldwell* >> THE PRACTICAL MATTER WAS WE  
BASICALLY ~~ATTACHED~~ *attached* 3.5 AND WE  
WOULD SEE NEGLIGENCE IS THE  
FAILURE TO REACH THE CARE IN  
SUCH WERE THE ISSUE WOULD BE  
WHETHER THE MANUFACTURER WAS  
NEGLIGENT IN MANUFACTURER  
PRODUCING AND SELLING WHATEVER  
IT IS A TRUCK PRODUCT FRAME  
WINDOW GROUP WITH A DEFECT IN  
THE STEERING SYSTEM, RAKING  
SYSTEM, WHATEVER, WHICH CAUSED  
INJURY.

SO THAT THE WAY IT WAS HANDLED.

*Patient* >> SO THIS IS WHERE I THINK YOUR  
POINT IS THE CASE IF THE  
PLAINTIFF DECIDED THEY WANT TO  
BRING THIS FAILURE TO WARN AND  
NEGLIGENCE CLAIM ~~TO THIS POST OF~~  
STRICT LIABILITY ~~ON TIL YOUR~~  
WARRANTED.

*as opposed to*

*Failure to  
warn*

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Paciente

IT SEEMS TO ME SOMEBODY COULD BE  
NEGLIGENT AND HAVING WARNED IN  
THE LEGAL CAUSE OF INJURY  
OBVIOUSLY THEY HAVE TO PROVE  
THAT WITHOUT HAVING TO SAY AND  
THAT FAILURE TO WARN RESPA  
PRODUCT IN A DANGEROUS POSITION.  
IT SEEMS THAT HAVING THIS

ELEMENT IS REQUIRED FOR THE  
STRICT LIABILITY TO BE  
UNREASONABLY DANGEROUS AND BRING  
IT OVER TO THE NEGLIGENT SIDE.  
WHY WAS IT THAT THE ONE THAT  
NECESSARY?  
IN OTHER WORDS, THE FAILURE TO  
WARN OR FAILURE TO NEGLIGENTLY  
WARNED.

*Colburn* >> IF I FOLLOW THE COURTS  
QUESTION, THAT WAS SORT OF THE  
PROBLEM PRESENTED IN THE  
MORELAND VERSUS SAFETY  
ENGINEERING CASE IN WHICH THE  
JURY THERE FELT NO DEFECT THAT  
NEGLIGENCE IN THE DEFENDANT  
THERE ARGUED LESS THAN  
INCONSISTENT VERDICTS IN THE  
FOURTH DISTRICT COURT OF APPEAL  
POINTED OUT KNOW THAT THERE WAS  
EVIDENCE OF BOTH DEFECTS IN  
WARNING ABOUT THE JURY COULD  
VERY WELL HAVE FOUND A DEFECT IN  
THE PROJECT AT LEAST WAS PRESENT  
WHEN IT LEFT THE HANDS OF THE  
MANUFACTURER BUT THAT THERE WAS  
A NEGLIGENT FAILURE TO ONE OF  
THE DEFECT WHICH OCCURRED LATER.  
SO THE COURT IS CORRECT.  
NUMBER ONE, THERE IS A  
DIFFERENCE BETWEEN STRICT  
LIABILITY AND NEGLIGENCE.  
HOWEVER, IF YOU'RE TALKING ABOUT  
DESIGN OR MANUFACTURING DEFECT,  
THE NEGLIGENCE AND THOSE ISSUES  
HAS TO RESOLVE AROUND THE  
DEFECT.

*Moorman*

*Pariente* >> IS ~~VERY~~ <sup>there a</sup> NOTE ON USE THAT SAYS  
THAT, YOU KNOW, IN OTHER WORDS,  
I JUST GOT THE INSTRUCTION IS  
FINE, BUT IT SEEMS THAT BY  
PUTTING IN THE RESULTS OF A

PRODUCT BEING IN UNREASONABLY  
DANGEROUS CONDITION IS MERGING  
THESE TWO SERIES TO A WAY THAT I  
THINK COULD BE CONFUSING TO A  
JURY.

*Caldwell* >> WE DO NOT HAVE A PROBLEM.  
IN FACT, WE OBJECT TO IT.  
MS. LUMISH AND I OBJECT IT AND

*Caldwell* NOT PROPOSED INSTRUCTION.

IT'S A POOR SUBSTITUTE FOR THE WORD DEFECT.

UNREASONABLY DANGEROUS IS A STRICT LIABILITY CONCEPTS.

*West* WEST VERSUS CALA COLOR ON THE FIRST DISTRICT COURT OF APPEAL, FIRST LINK IN VERSUS DAVIS 2007 CASE.

THE WORD DEFECT, CONCEPT OF DEFECT IS INHERENTLY EMBEDDED IN A NEGLIGENCE PRODUCT LIABILITY CLAIM.

THE PRODUCT HAS GOT TO BE AFFECTED.

*Lewis* IT'S GOING TO THE WARNING ASPECT.

SO ARE YOU SAYING THEN THAT THE LACK OF THE WARNING PRODUCES A DEFECTIVE PRODUCT.

THAT'S THE ARGUMENT.

SO THAT WORD HAS TO COME IN.

AND ALL SITUATIONS --

*Caldwell* >> I THINK WERE IN AGREEMENT WITH THE PART OF THE JUSTICE ASSOCIATION THAT THE WORDS AND TO COME OUT.

>> IS THAT ALWAYS?

>> WE HAVE PROPOSED SOME LANGUAGE TO PUT IN PLACE OF THAT IS THAT THE JURY MUST FIND --

*Lewis* >> IS NOT A TRUE STATEMENT TO SAY THAT ANYTIME YOU DEAL WITH THE FAILURE TO WARRENT NEGLIGENCE IN THAT ARENA THAT IT MUST BE A DEFECTIVE PROJECT OR THE PRODUCT MAY BE FINE IS JUST THAT YOU HAVEN'T WORN PROPERLY AS TO WHATEVER.

>> .SLOT 3.10.

>> IF THE NEGLIGENT DESIGN DEFECT.

*A + FJA agree to delete unreas. dangerous from neg. instr.*



*Pariente*

>> WHAT YOU HAVE THE ONE THAT  
ONE MAKES THE PRODUCT  
UNREASONABLY DANGEROUS, SO IT  
ALSO HAS THE SAME LANGUAGE.

*Caldwell*

> AGAIN, IF YOU USE THE  
DEFECT --

*Lewis*

>> I ASKED THAT QUESTION TO  
WARNING.

*Lewis*  
DOES UNDER OUR LAW AND I DON'T  
HAVE THE ANSWER TO THIS, BUT IT  
TO ME THAT YOU COULD HAVE A  
FAILURE TO WARN, BUT THAT  
DOESN'T MAKE PRODUCT DEFECT IS.  
THE SHOES THAT FIGURED NO ONE  
NOT WARNED WHATEVER IT IS GOOD  
THE PRODUCT MAY BE OPERATING  
EXACTLY THE WAY IT WAS DESIGNED  
AND INTENDED.

BUT BECAUSE OF THAT, THERE NEEDS  
TO BE SOME KIND OF WARNING TO IT  
THAT THE SAFETY DEVICES.

BUT IT'S NOT A PERFECT PRODUCT,  
THE FAILURE TO WARN OF THIS.

[INAUDIBLE]

*Caldwell* > YOU WOULDN'T HAVE DEFECT  
THERE.

*Lewis* > BECAUSE THE DEFECT IS IN THE  
WARNING.

*Pariente* > EFFECTIVELY AND A LOT OF  
TIMES THEY DO WANT TO GIVE  
WARNING OF THE DEFECT AND THEY  
HAVE THE RIGHT TO TRY TO SHOW  
THAT THE STRICT LIABILITY.  
WHEN YOU'RE JUST DOING PLAIN OLD  
NEGLIGENCE TO TRY TO HAVE TO  
DESCRIBE IT AS A DEFECT IN WHICH  
BRINGS YOU RIGHT BACK TO THE  
STRICT LIABILITY INSTRUCTION  
SEEMS THAT IT ENDS UP HAVING THE  
RISK OF A JURY MERGING THE TWO  
CONCEPTS

AND IT SEEMS LIKE IT'S WORKING  
PRETTY WELL WHEN YOU HAVEN'T HAD  
AN INSTRUCTION ON NEGLIGENCE.

*Caldwell* > RIGHT, THE CONCEPT OF DEFECT  
CREATES A STRICT LIABILITY.  
THE CONCEPT FOR DEFECTS, THE  
ROYAL VERSUS BLACK & DECKER CASE  
WAS DECIDED BY THE THIRD  
DISTRICT COURT OF APPEAL IN

1967, NINE YEARS BEFORE THE  
ADOPTION OF THE STRICT LIABILITY  
BY THIS COURT.  
SO THE CONCEPT OF DEFECT IS AS I  
SAID THE CORNERSTONE OF PRODUCTS  
LIABILITY IN FLORIDA.  
I MEAN, THE CASES ARE UNANIMOUS  
THAT YOU HAVE TO HAVE THE

CONCEPT DEFECT IN A PRODUCTS LIABILITY CASE IN AN INSTRUCTION AND NEGLIGENCE INSTRUCTION, WHICH TOTALLY OMITTS THE WORD DEFECT, DOES NOT CONFORM TO THE LAW OF FLORIDA.

>> AND WHAT THAT MR. CALDWELL COMING TO HAVE USED UP ALL OF YOUR TIME.

MS. O'CONNOR.

>> MAY IT PLEASE THE COURT, I'M KATHLEEN O'CONNOR AND I'M HERE TODAY TO ADDRESS THE GOVERNMENT RULES JURY INSTRUCTION.

I'M HERE BECAUSE THE GOVERNMENT RULES AND INSTRUCTIONS HAVE BEEN PULLED BY THE COMMITTEE AND EVERYBODY WHO HAS SUBMITTED COMMENTS ON THIS, WHETHER FOR THE PLAINTIFF SIDE OR THE DEFENSE SIDE AGREES THAT THERE SHOULD EAT AN INSTRUCTION ON THIS.

AND I THINK JUSTICE.

ANTIQUE, I'D LIKE TO MAKE A COUPLE OF COMMENTS ABOUT SOME QUESTIONS THAT SHE LAST MR. STEWART WHAT'S HAPPENING ON THE GROUND AND ARE THERE ANY CASES.

WHAT'S HAPPENING ON THE GROUND AS I DO A LOT OF TRAIL SUPPORT WORK AS WELL AS THOSE APPEALS AND I WOULD SAY IT'S OUR EXPERIENCE THAT MOST JUDGES ARE NOT GIVING AN INSTRUCTION ON THE GOVERNMENT RULES AND BECAUSE THERE ISN'T A STANDARD INSTRUCTION. *more time*

IN THE WARTIME THAT GOES BY WITHOUT ONE, THE MORE THE JUDGES THINK WELL IF I'M SUPPOSED TO

Kathleen O'Connor  
Government Rules  
(A perspective)

GIVE AN INSTRUCTION ON THIS, THE  
UNIT STRUCTURE THAN THE BOAT.  
THIS STATUTE HAS BEEN ON THE  
BOOKS FOR 11 YEARS.  
WE WERE SUCCESSFUL.  
I WOULD SAY MAYBE IN TWO OUT OF  
FIVE CASES JUDGES HAVE GIVEN  
THIS INSTRUCTION AND WE DO HAVE

A CASE SITE OR THE 11th  
CIRCUIT GROUP TO GIVING OF THE  
GOVERNMENT RULES INSTRUCTION IN  
THE CASE AND WE CITED THAT THEIR  
PAPERS.

IT BECAME READERS CASE.

SO EVERYONE OUTSIDE AGREES THERE  
SHOULD EVEN INSTRUCTION.

*Pariente* >> EVERYONE BUT THE COMMITTEE  
THAT SUBMITTED THE REPORT.

*O'Connor* >> YES A LOT THE ONLY REASON I'M  
HERE.

IF EVERYONE AGREED IT WOULD'VE  
STAYED HOME, BUT THE COMMITTEE  
DOES NOT AGREE.

SO WE THINK.

*Pariente* >> WHAT IS THE PROBLEM THAT WAS  
EXPRESSED AS WHETHER THIS IS A  
REBUTTABLE PRESUMPTION RE:  
VANISHING PRESUMPTION.

*O'Connor* IS THAT WHAT CAUSED THE HANGUP?

>> I THINK THAT WAS ONE THING  
THAT CAUSED A HANGUP FROM MY  
READING THROUGH THE COMMITTEE  
NOTES.

BUT I THINK IN THIS CASE IT IS  
IF WE HAVE TO PUT A LABEL ON IT,  
IT IS A BURDEN SHIFTING  
PRESUMPTION WHEN YOU'RE TALKING  
ABOUT THE MANUFACTURER FAILING  
TO COMPLY WITH THE STANDARDS.  
IF THAT'S THE SITUATION, THEN  
THE MANUFACTURER IS A  
PRESUMPTION APPLIES IN THE  
MANUFACTURER HAS TO OVERCOME  
THAT PRESUMPTION.

*Canady?* >> WHY WOULDN'T IT GO THE OTHER  
WAY?

*O'Connor* >> WELL, BECAUSE THE BURDEN IS  
ALREADY ON THE PLAINTIFF TO  
PROVE DEFECT.

SO IF THE MANUFACTURER COMPLIES,

THE PRESUMPTION APPLIES AND THE  
PRODUCT IS PRESUMED NOT TO BE  
DEFECT DID, BUT THE PLAINTIFF  
CAN OVERCOME THAT BECAUSE IT'S A  
REBUTTABLE PRESUMPTION. ~~SO THERE'S NO SHIP THERE.~~ shift  
IT'S WHERE IT ALWAYS SAYS.  
BUT FROM THE OTHER SIDE OF THE

MANUFACTURER DOESN'T COMPLY,  
THEN THE BURDEN SHIFTS TO THE  
MANUFACTURER TO SHOW A LACK OF  
DEFECT OR NEGLIGENCE.

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*Pariante* >> I GUESS THE ISSUE ON THIS ONE  
IS THAT THAT STATUTE IS THE  
LEAST AS IT COMPLIES IS PRESUMED  
TO BE NOT AFFECT THEIRS.  
IF SUBSTANCE CHANGED IN THE LAW.  
I MEAN, I RUINED HER WITH MAKING  
THE ARGUMENT, IT DOESN'T MATTER.  
THE GOVERNMENT RULES OF THE FOUR  
THAT HAS NOTHING TO DO WITH A  
PRODUCT IS DEFECT IS.  
SO I JUST WISH THIS CASE WOULD  
COME UP AS A CASE SO WE CAN  
DECIDE THE ISSUES AND TRY AND  
FIGURE IT OUT IN THE JURY  
INSTRUCTIONS, BUT IT WASN'T  
RIGHT?

*to be not defective - that is a  
substantive change in the  
law*

WE HAVE NOT SEEN THIS ISSUE IN  
11 YEARS.

*O'Connor* RIGHT NOW, IT'S ONLY COME UP IN  
FEDERAL COURTS AN APPEAL.

*Pariante* >> I MEAN, NOBODY'S LITIGATING?

*O'Connor* >> YES, BUT --

*Pariante* >> WOULD'VE A CERTIFIED QUESTION  
FROM THE 11th CIRCUIT SOMEDAY.

*O'Connor* >> I BELIEVE IF WE AREN'T ACTING  
FOR A CASE BECAUSE THE  
LEGISLATURE HAS SAID WHAT THE  
LAW IS.

>> I SHOULD SAY THE STATUTE  
ITSELF IS A CHANGE IN THE  
SUBSTANTIVE LAW BUT IT SHOULD BE  
GIVEN EFFECT TO RICHARD  
INSTRUCTION.

*O'Connor* >> CORRECT BECAUSE OTHERWISE IT  
IS A MERIT MEANING REALLY.  
UNLESS THERE IS A JURY  
INSTRUCTION ON IT.  
[INAUDIBLE]



O'Connor

>> CORRECT.

AND WHEN THEY AREN'T, THEY'RE  
SANE WHILE IT'S NOT A STANDARD  
JURY INSTRUCTION, SO I KIND OF  
GOES IN A CIRCLE.  
AND WITHOUT THE JURY  
INSTRUCTION, I THINK IT'S GOING  
TO CONTINUE TO GO THAT WAY SINCE

O'Conner

has been on the books

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THE STATUTE IS TO ~~NUMB~~ THE LOOK  
FOR SUCH LONG TIME.

AND I DO THINK IN OUR SUBMISSION  
WE POINT OUT THAT THE  
LEGISLATURE WAS THINKING ABOUT  
JURY INSTRUCTIONS AND ENACT THIS  
VERY STATUTE.

AND I THINK IT'S BEEN POINTED  
OUT THAT THERE IS NEGLIGENCE PER  
SE AND THE COMMITTEE NOTES SHOW  
THAT THE LEGISLATURE SAID WELL  
IT'S A ONE-WAY STREET IF SOMEONE  
VIOLATES THE STATUTE, THERE'S AN  
INSTRUCTION ON THAT.

WHAT IF THEY COMPLY WITH STATUTE  
STANDARDS RULES, SHOULDN'T THERE  
BE AN INSTRUCTION ON THAT?

AND THAT IS HOW THIS WHOLE THING  
GOT STARTED.

SO OBVIOUSLY, THE VERY IDEA OF  
PASSING THIS IN THE MINDS OF THE  
LEGISLATORS WAS SO THAT THERE  
COULD BE A JURY INSTRUCTION AND  
WE THINK THAT GIVING THE  
INSTRUCTION IS CONSISTENT WITH  
LEGISLATIVE INTENT.

>> IN THANK YOU VERY MUCH FOR  
Quince YOUR COMMENTS HERE TODAY ALSO.  
I'M GOING TO LEAVE A MINUTE OR  
HALF FOR REBUTTAL.

>> I WAS LOOKING TO ADDRESS THE  
LAST ISSUE IN SPITE OF THE  
COMMITTEE DECIDE

[INAUDIBLE]

[INAUDIBLE]

>> YOUR HONOR, THE COMMITTEE  
STRUGGLED WITH WHETHER WAS THE  
TYPE OF PRESUMPTION ABOUT WHAT  
SHE WOULD INSTRUCT THE JURY AND  
FINDING NO EVIDENCE IN THE  
STATUTE CODE WITH A BURDEN  
SHIFTING PRESUMPTION MAKES THE

Tracy  
Gunn  
Pariente

Tracy Gunn

Gunn

MAJORITY OF THE COMMITTEE VOTED  
NOT TO HAVE THE INSTRUCTION.  
WHAT WE DID DO IS PROVIDE A NEW  
NOTE ON USE SAYING ALTHOUGH  
WE'RE NOT PROPOSING AN  
INSTRUCTION, WE KNOW THAT THIS  
ISSUE IS OUT ~~OF YOUR AND RELATED~~  
TO THE PARTIES TO MAKE THE

here and leave it to

Gunn

25

ARGUMENT FOR INSTRUCTION IN A GIVEN CASE HOPING THAT WHAT TOM TO CASE AND CONTROVERSY TO COME UP WITH THE COURT.

I DO WANT TO BRIEFLY DISCUSS THE MERGER APPEAL FOR AND FIVE BECAUSE THERE WERE PEOPLE WHO COMMENTED FOR PEOPLE IN FAVOR OF THAT ~~MURDER~~ <sup>merger</sup> AND THAT'S A SEPARATE ISSUE FROM THE RISK-BENEFIT ISSUE.

JUDGE FARMER, CHAIR OF THE SUBCOMMITTEE AND FELT HIS OWN COMMENTS AS A MAJOR PROPONENT OF MERGING THOSE TWO AND THE REASON WAS HIS VERY THAT THERE WAS NO BURDEN ON THE THING IS TO PROVE WHETHER WAS A MANUFACTURING DEFECT OR A DESIGN DEFECT AND THAT WAS REALLY JUST A CONSTRUCT THAT LAWYERS USED, THINKING ONE WAY OR THE OTHER.

Patient >> YOU THINK NOW SOME OF THE TEST JUST DON'T APPLY.

Gunn >> AND WE DEFINITELY HAD CONCERNS IN THE COMMITTEE THAT THE CONFUSION ISSUE.

JUDGE FARMER NOTED WHEN A PRODUCT IS THIS MUCH DEBATED TO COMPROMISE ON THE SIDE.

I WANT TO NOTE THAT THE FJA COMES THAT PAGE FIVE AND 62 SUPPORT THE ~~MURDER~~ OF FOUR AND FIVE SO I THINK THERE WAS SOME CONVERSION CONFUSION.

merger

THAT LEADS US INTO THE ~~HOW~~ <sup>HOW</sup> ISSUE SHOULD RISK-BENEFIT BE IN THERE.

THESE REALLY ARE TWO SEPARATE ISSUES IN THE COURT COULD SEPARATE OR MERGE PO FOUR AND FIVE INSIGHTFULLY ADDRESS THE BENEFIT QUESTION ABOUT WHETHER

IT SHOULD BE IN THERE.  
DEPENDING FOR THE DEVELOPMENTS  
IN THE LAW CONSTRUCT IS  
SOMETHING THAT THE COMMITTEE IS  
USED IN THE PAST WHEN WE'VE  
IDENTIFIED ISSUES WERE WITHOUT  
THE LAW WAS NOT SETTLED IN  
RECOGNIZING OUR JOB IS HARD TO

*Gunn* MAKE LAW IN THE COMMITTEE,  
HOPING TO AT LEAST GIVE THEM THE  
COMFORT LAW.

SOMETIMES THEY WON'T GET THE  
INSTRUCTION IF I IF I PUT THE  
NOTE ON USE AND THEY'RE SAYING  
WE'RE NOT SURE.

GIVES TRIAL JUDGES THE COMFORT  
TO MAKE THE RULING AND LET THE  
LAW DEVELOPED, SO THAT'S THE  
PURPOSE OF USING THEM.

IF THERE'S ANY OTHER QUESTIONS  
I'D BE HAPPY TO DO SO, BUT MY  
TIME IS UP.

*Quince* >> OKAY, THANK YOU GOOD ACCORD  
LIKE TO ECHO THE COMMENTS OF  
JUSTICE LEWIS THAT WE ALL  
APPRECIATE ALL THE WORK THAT HAS  
GONE ON OVER THE YEARS AND ARE  
QUESTIONS ABOUT IT IS NOT A  
REFLECTION THAT WE DON'T  
APPRECIATE IT BECAUSE WE  
CERTAINLY DO AND WE KNOW THAT IT  
IS HARD WORK IN THESE COMMITTEES  
TO COME UP WITH THESE  
INSTRUCTIONS FOR THE CORE.  
SO WE REALLY APPRECIATE THE HARD  
WORK ALONG YOU.  
THANK YOU.

>> CAN WE GIVE YOU BACK A  
NOTEBOOK?

[LAUGHTER]

>> THANK YOU.

**Debra Gregory**

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**From:** Rebecca Mercier-Vargas  
**Sent:** Thursday, July 26, 2012 2:42 PM  
**To:** Elizabeth Russo; David Sales (david@salesappeals.com); (ctjujk1@ocnjcc.org); Laura Whitmore (Laura.Whitmore@arlaw.com); Gary M. Farmer (farmergm@att.net); gfox@stfbllaw.com; Ralph Artigliere (skywayra@tds.net); twboyer@coj.net  
**Cc:** Barton, James ; Jodi B Jennings; jlang@carltonfields.com; lacone, Diane  
**Subject:** products liability subcommittee--summary of July 26 conference call  
**Attachments:** image001.jpg; chart - small group assignments (00020879).DOCX; union carbide v. aubin (00020880).RTF

I enjoyed speaking with Ralph, Liz, Laura, and Jodi today during the products liability conference call. We discussed our strategy and timeline for filing a report in the Supreme Court by April 15.

Our goal is to have a proposal with all the instructions, model charges, and verdict forms for the full committee to consider at our Jacksonville meeting on October 25-26. Materials for the meeting agenda are due on October 8. After the meeting, we will publish the proposal. We will consider any comments from the public before the next full meeting of the committee on February 21-22.

To meet these goals, we decided that it would be most productive to divide our subcommittee into smaller groups for drafting. I have attached a chart showing the assignments for each drafting group. Each drafting group will submit a report proposing draft instructions and explaining the reasoning of the small group and any issues the subcommittee should consider.

**September 7: due date for the reports** from the small groups drafting the **defect, crashworthiness and inference** instructions.

**Thursday September 13 at noon:** the full subcommittee will have a conference call to discuss these three reports from the small groups (defect, crashworthiness, inference)

**September 21: due date for the report** from the last drafting group, **model charges, verdict forms and miscellaneous.**

**Thursday September 27, 2012 at noon,** we will have a conference call to discuss any outstanding issues and the report on model charges, verdict forms & miscellaneous issues.

**October 8:** due date to submit materials for full committee meeting.

Call-in number: 888-376-5050

Participant pin: 9658741256

My initial e-mail of July 11 had asked everyone to reserve time on your calendars for a series of phone conferences. We decided that having the bulk of the work done by the small groups would more productive than this many calls of the full subcommittee. Please **DELETE FROM YOUR CALENDARS this series of noon conference calls on: 8/1/12, 8/22/12, 9/12/12, 9/19/12, 10/23/12, 11/7/12, 11/16/12.** These conference calls are no longer necessary.

Finally, I have attached for your review the Third District's decision in Union Carbide v. Aubin, which Judge Barton asked us to consider. It has an interesting discussion of the definition of defect and the applicability of the Restatement (Third) of Torts.

Thanks very much for all your help on this!

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**From:** Rebecca Mercier-Vargas

**Sent:** Wednesday, July 11, 2012 4:40 PM

**To:** David (david@salesappeals.com); (ctjuik1@ocnjcc.org); Laura Whitmore  
(lwhitmore@stfbllaw.com); Gary M. Farmer (farmergm@att.net); gfox@stfbllaw.com  
(gfox@stfbllaw.com); J. Lang (jlang@carltonfields.com); 'Iacone, Diane'  
(dia.iacone@stfbllaw.com)  
**Subject:** 331. products liability subcommittee--timelime and assignments

Hello there, members of the products subcommittee:

I hope you all are doing well. Unfortunately, I am unable to attend our Tampa meeting tomorrow in person. My partner Jane just had surgery Monday, which turned out to be more complicated than expected. I need to stay in the office to cover some issues here for her. But, I am planning to call into the meeting, especially during the Friday morning discussion of products.



Attached you will find a revised chart listing the instructions the Court has asked us to work on and a timeline. The Supreme Court asked us to submit a report by November 19. Working backwards to meet that deadline, we will need to publish our proposed amendments for comments by October 1. That will give the full committee a chance to consider any comments at the meeting in Jacksonville on October 25-26.

Because we are on such a tight timeframe, I took the liberty of assigning each member of the subcommittee to draft one of the instructions or the verdict form. Gary Farmer has a real knack for inferences, so I thought he would be a natural to take the lead on that instruction. If any of you want to trade assignments with each other, just let me know. We will each need to complete these individual instructions by the end of this month, or by 7/31/12. That will allow us to combine each of the individual instructions into a single proposal and circulate it to the full committee before publication.

This is an ambitious timeline. I would typically ask for your availability before scheduling a conference call. However, I thought it best to try and get these dates on the books as soon as possible. If you can't make any of these calls, please feel free to e-mail or call me with your comments the day before the call so that the subcommittee can consider your input.

Please calendar the following conference calls, which will all be scheduled for **noon**:

7/18/12

8/1/12

8/22/12

9/12/12

9/19/12

10/23/12

11/7/12

11/16/12

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**PRODUCTS SUBCOMMITTEE**  
**DRAFTING GROUPS**

<b>Drafting Group</b>	<b>Assignment</b>	<b>Members</b>
<b>Defect</b>	Revise definition of defect in 403.7 and, if necessary, 403.15, which uses the same definition	<b>Vargas*, Whitmore, Fox.</b>
<b>Crashworthiness</b>	Revise crashworthiness instruction 403.16 and consider the 2011 amendment to the comparative fault statute, section 768.81, which was intended to overrule <u>D'Amario v. Ford Motor Co.</u> , 806 So. 2d 424 (Fla. 2001).	<b>Russo*, Artiglieri, Kest</b>
<b>Inference</b>	Draft instruction 403.11 on inference of product defect or negligence and address: (1) the rebuttable presumption created by section 768.1256, Florida Statutes when a party either complies or fails to comply with government rules; and (2) the presumption of defect recognized in <u>Cassisi v. Maytag Co.</u> , 396 So. 2d 1148 (Fla. 1st DCA 1981), when a product malfunctions during normal operations.	<b>Farmer*, Boyer, Sales</b>
<b>Model charges, verdict forms, &amp; miscellaneous</b>	Revise instructions 403.13 (preliminary issue), 403.14 (burden of proof on preliminary issue), model charges 7 and 8 and verdict forms. Check all products instructions for consistency with any changes to reorganized book since committee submitted original products proposal to Court.	<b>Whitmore*, Vargas, Artiglieri, Boyer</b>

**Debra Gregory**

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**From:** Rebecca Mercier-Vargas  
**Sent:** Thursday, September 13, 2012 3:17 PM  
**To:** Elizabeth Russo; David Sales (david@salesappeals.com); (ctjujk1@ocnjcc.org); Laura Whitmore (Laura.Whitmore@arlaw.com); Gary M. Farmer (farmergm@att.net); gfox@stfbllaw.com; Ralph Artigliere (skywayra@tds.net); twboyer@coj.net; Barton, James ; Jodi B Jennings; jlang@carltonfields.com; lacone, Diane; Baggot, Brian; Porter, Shelli  
**Subject:** SJI products subcommittee: summary of conference call on Sept. 12  
**Attachments:** image001.jpg

Hello, members of the products liability subcommittee:

I am pleased to let you know that we have a new member, Brian Baggot, who was recently appointed to the SJI. Brian is a partner at Rumberger, Kirk & Caldwell and his primary practice is representing defendants in products cases. When you are e-mailing him, please also copy his secretary Shelli Porter, whose address is above.

Thank you to Liz, Brian, and Laura for participating in the conference call today. I appreciated your input. We also considered the comments of Ralph and Judge Kest, which had been submitted in advance. Here is a summary of our call:

**Crashworthiness:** Liz explained the recommendation in her memo that it is not necessary to have a standard crashworthiness instruction. Section 768.81(3) expressly states that it overrules D'Amario and applies retroactively. Under section 768.81, the jury is to consider the fault of all of those who contributed to the accident when apportioning fault.

Brian reported that there are no appellate cases addressing whether retroactive application of the statute is constitutional. However, Brian is aware of approximately six trial court cases applying the statute retroactively. Liz expressed the opinion that until an appellate decision rules the statute cannot be retroactively applied, our committee is bound to follow it.

Liz, Laura and I felt that the intent of the statute is to treat defendants in crashworthiness cases like all other defendants. For this reason, the jury can be given standard causation instructions explaining that an injury can have more than one cause and standard damages instructions explaining how to apportion damages. In an e-mail, Judge Kest suggested that we might need to modify the causation instruction (401.12) to make clear even though any fault of the manufacturer happened long BEFORE the negligence of the drivers, it can still be considered a legal cause. We discussed this concern and felt that the instruction on intervening cause 401.12c, already adequately covers this.

Brian felt that we may still need a special instruction in crashworthiness cases 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.

**Brian is going to draft a proposed crashworthiness instruction for the subcommittee to discuss at our next call. The consensus during the call was that a special crashworthiness instruction will not be needed in light of the statute. Liz will draft a proposed note explaining the reason no standard instruction is needed.**

**Design defect:** I gave an overview of my memo, which recommended revising the instruction on defect in 403.7 and 403.15d to do three things: (1) give separate definitions of manufacturing and design defects; (2) use the alternative tests for risk/benefit and ordinary consumer, pending further development in the law; and (3) update the notes on use to include the new cases from the Third District adopting the Restatement (Third) of Torts and the risk/benefit test. **We agreed to approve the draft instructions and notes on use as set forth in the memo.**

**Inferences:** Laura agreed to draft an instruction on the government rules defense. We tabled the discussion of Cassisi instruction and memo Gary circulated until our next conference call. Brian and I will circulate government rules instructions submitted in other cases.

Our next conference call is scheduled for **Thursday, September 27 at noon**. We will be discussing the crashworthiness instruction and inference instructions. I would appreciate it if you circulate the instructions to be discussed at that call by next Friday, Sept. 21, or the following Monday-Tuesday at the latest.

Thanks very much,  
Rebecca

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**Debra Gregory**

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**From:** Rebecca Mercier-Vargas  
**Sent:** Wednesday, October 03, 2012 1:11 PM  
**To:** Elizabeth Russo; David Sales (david@salesappeals.com); (ctjujk1@ocnjcc.org); Laura Whitmore (Laura.Whitmore@arlaw.com); Gary M. Farmer (farmergm@att.net); gfox@stfbllaw.com; Ralph Artigliere (skywayra@tds.net); twboyer@coj.net; Barton, James ; Jodi B Jennings; jlang@carltonfields.com; lacone, Diane; Baggot, Brian; Porter, Shelli  
**Subject:** SJL products liability instructions - summary of conference call on Thursday, Sept. 27  
**Attachments:** image001.jpg

I hope you all are well. During our subcommittee conference call on Thursday, September 27, Liz, Laura, Jodi and I participated. Here is a summary of our call. The meeting materials for our October meet are due on **Monday October 8**. I am in the process of drafting a subcommittee report. I noted in bold the items that need further work or consideration.

#### **CRASHWORTHINESS:**

Judge Kest was unable to join us because he was attending the funeral of a very close family friend. However, we discussed the concerns Judge Kest had raised in e-mails that it may be necessary in crashworthiness cases to modify the causation instruction. Judge Kest feels that because the existing causation instruction may not be sufficient because it could be read as only addressing an "intervening" cause that happens **AFTER** the defendant's actions or an "other" cause that was reasonably foreseeable.

After additional debate on this issue, we felt that the existing causation instruction is sufficient and already addresses the situation where the defendant's negligence or strict liability when the car was designed or built can be a concurring cause with the negligence of any of the drivers involved in the accident.

Following our meeting, Liz Russo submitted a proposed note on use regarding the crashworthiness instruction. Liz, Laura and I revised her proposal and suggest the following language. **Please review this proposed note on use for crashworthiness instructions. Let us know if you have any suggested revisions or comments:**

+++

#### **403.16 ISSUES ON CRASHWORTHINESS AND "ENHANCED INJURY" CLAIMS**

#### **NOTE ON USE**

In 2011, the Legislature amended section 768.81, Florida Statutes, to state that in a products liability case where the plaintiff claims that a defect in the

product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the Legislature intended this amendment to overrule the decision in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001). See Ch. 2011–215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater or additional injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

+++

#### GOVERNMENT RULES.

Laura presented her memo, which recommended against adopting an instruction on government rules. As explained in Laura's memo, the committee had published a proposed instruction on the government rules statute, section 768.1256, Florida Statutes. Ultimately, the committee decided against recommending an instruction because the law was unsettled regarding whether the statute created a burden-shifting or a vanishing presumption. Laura researched this issue and there are still no cases clarifying what type of presumption the government rules statute creates. We unanimously agreed with Laura's recommendation not to propose an instruction on the government rules statute because the law remains unsettled regarding the type of presumption created by the statute.

In the event the committee disagrees with our recommendation, we agreed on the language for a government rules instruction as proposed by Laura as "Option 2" on page 8 of her memo. Laura started with the government rules instruction published by the committee on December 15, 2008 (which is in Appendix B to the products report). She revised this instruction because the statute also creates a presumption of defect or negligence when a product fails to comply with a government rule. In Option 2, Laura used two separate paragraphs to address (a) compliance; and (b) non-compliance with a government rule:

+++

#### **403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE**

##### *a. Product that complied with government rules:*

**If you find that (the product) complied with (describe applicable statute, code, rule, regulation or standard) at the time (the product) was [sold] [or] [delivered], you should presume that (the product) [was not defective][or] [(Defendant) was not negligent] unless (Claimant) proves by the greater weight**

**of the evidence that (the product) did not comply with (describe applicable statute, code, rule, regulation or standard). You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(Defendant) was negligent].**

*b. Product that does not comply with government rules:*

**If you find that (the product) [failed to comply with] (describe applicable statute, code, rule, regulation or standard) at the time (the product) was [sold] [or] [delivered], you should presume that (the product) [was defective [or] [(Defendant) was negligent] unless (Defendant) proves by the greater weight of the evidence that (the product) complied with (describe applicable statute, code, rule, regulation or standard). You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(Defendant) was negligent]**

+++

### CASSISI INFERENCES:

Note 2 to instruction 403.11, Inference of Product Defect or Negligence, explains that under Cassisi v. Maytag Co., 396 So. 2d 1148 (Fla. 1<sup>st</sup> DCA 1981), an inference of defect arises when a product malfunctions during normal operations. The committee did not propose a specific instruction on Cassisi inferences. Note 2 states, "Pending further development in Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the Cassisi inference applies."

The Supreme Court asked for public comment regarding whether a government rules instruction was needed. At oral argument, one person specifically argued that a government rules instruction was needed. The Court has not suggested, in a request for public comment or at oral argument, that the committee should propose an instruction to address Cassisi.

Laura researched this issue recently for one of her cases and the law remains unsettled regarding whether an instruction on a Cassisi inference is required. We reviewed the memo and Cassisi instruction Gary Farmer provided, which the committee had considered back in 2008.

**Our consensus was that the committee should continue to recommend that the Court not adopt a specific instruction on the Cassisi inference. However, Laura will update her research regarding whether any recent cases have addressed Cassisi inferences. I will review whether the committee had received public comments on the note on use declining to propose a Cassisi instruction.**

### MISCELLANEOUS ISSUES

INSTRUCTION 403.13, Preliminary Issue, and INSTRUCTION 403.14, Burden of Proof

on Preliminary Issue: We discussed Laura's e-mail on these instructions (dated 9/11/12). These instructions are closely related and need to be considered together. Laura explained that, as to instruction 403.13, the Supreme Court decision "rejects" the committee's proposal (page 4) and "refer[s]" it back to the committee "to make revisions consistent with the instructions preliminarily approved by the Court" (pages 4-5). The appendix to the decision states that instruction 403.13 is "reserved," which suggests that the Court intends our committee to keep working on this instruction.

As to instruction 403.14, the opinion is inconsistent. The opinion both "preliminarily approves" this instruction and refers it back to the committee for further work. The appendix restates the version of instruction 403.14 proposed by the committee without any change. This suggests that the Court intended to preliminarily approve it.

We discussed the fact that the Judge Barton had sought clarification from Clerk of Court Tom Hall on this issue in an e-mail, but we have not received a response. The Court's publication notice, comments during oral argument, and decision do not give our committee an indication of the type of revisions, if any, intended by the Court.

Laura suggested a slight revision to instruction 403.14 to make it more consistent with the language regarding burden of proof used throughout the reorganized book. There is some inconsistency in the reorganized book, but most of the instructions on the burden of proof begin the second paragraph with the phrase "However, if the greater weight" instead of "If, however, the greater weight..." We felt that it is clearer to amend instruction 403.14 to use the phrase "However, if the ..." This will make 403.14 consistent with the majority of the burden of proof instructions (see negligence instruction 401.17 as an example).

+++

### **403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE**

**If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].**

**~~If, however,~~ However, if the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].**

### **NOTE ON USE FOR 403.14**

- The bracketed language is for use if claimant makes alternative claim(s) of liability.  
+++

MODEL CHARGES AND VERDICT FORM:



We decided to get the committee's input on all our proposed revisions to the products instructions before drafting the model charges and verdict form.

**CONSISTENCY WITH REORGANIZED BOOK:**

**Laura will continue to work with the drafting subcommittee to review all of the products instructions to make sure that they conform with the reorganized jury instruction book and any recent amendments to the instructions (Whitmore\*, Vargas, Artigliere, Boyer).**

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## MEMORANDUM

**TO:** Products liability subcommittee  
**FROM:** Defect drafting team: Rebecca Vargas, Laura Whitmore, Gary Fox  
**DATE:** September 9, 2012  
**RE:** Definition of design defect in product instructions: 403.7, 403.15, 403.18

\*\*\*\*\*

Our drafting group was assigned the task of drafting the revisions to the definition of strict liability in instruction 403.7 in accord with the Supreme Court's decision. We also considered how the definition of defect impacted instruction 403.15, which lists the statement of the issues, and instruction 408.18, which lists affirmative defenses. Although the Supreme Court preliminary approved instructions 403.15 and 403.18, we wanted to make sure that all three instructions are consistent. The drafting group circulated drafts by e-mail and Whitmore and Vargas met by phone to discuss these issues.

### **A. Discussion of this issue at oral argument.**

As a brief background, after this committee submitted the products liability report, the Supreme Court sua sponte identified several issues that required further discussion. The Court asked for public comments on several issues, including how to define strict liability:

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

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

Sixteen people submitted comments on proposal #8. The committee responded that the concerns raised in the comments had been previously considered during the drafting process. Since the membership of the committee had changed substantially since the report was submitted, it was impractical to reopen discussions.

During the oral argument, several justices expressed concern that the committee's proposed instruction 403.7 was confusing because it combined the definitions for a manufacturing defect (PL 4) and design defect (PL 5). Justices Lewis, Quince, Pariente and Canady all asked questions regarding the wisdom of combining these instructions.

Our former member Larry Stewart argued for the plaintiff's bar and agreed that the risk/benefit test never applies to manufacturing defect cases. Mr. Stewart agreed that the Court could give separate definitions of manufacturing defect and design defect, as had been done in PL 4 and 5. Our former committee member Wendy Lumish agreed on behalf of the defense bar that it was a mistake to combine these instructions.

There was also substantial discussion during the argument on whether the definition of strict liability in 403.7 should include the risk/benefit test, the consumer expectations test, or both. The Court also discussed whether the risk/benefit test should be considered an element of the plaintiff's claim in instruction 403.7 or an affirmative defense in instruction 403.18.

Larry Stewart argued that the risk/benefit test and the Restatement (Third) of Torts have not been adopted by any Florida court. Justice Pariente's questions suggested she agreed with this, but felt that this issue would be better decided in an actual case and controversy. She warned that removing the risk/benefit test from the definition of defect would change the law substantially.

Wendy Lumish argued that the risk/benefit test should be retained. While Ms. Lumish agreed that no case directly held that the risk/benefit test is an element, she cited several cases as support: Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc., 48 So. 3d 976, 997 (Fla. 3d DCA 2010), Force v. Ford Motor Co., 879 So.2d 103, 107 (Fla. 5th DCA 2004), and Radiation Technology, Inc. v. Ware Constr. Co., 445 So. 2d 329 (Fla. 1983).

## **B. The Court's decision**

The Supreme Court's majority decision rejected instruction 403.7 and referred it back to the committee "to make revisions consistent with the instructions preliminarily approved by the Court" as set forth in the appendix (Op. 4-5). Interestingly, the Court revised the committee's proposed instruction 403.7 in several respects. First, the committee had proposed a single definition of defect that applied to both manufacturing and design defects. The Court provided separate definitions of design and manufacturing defects, which is consistent with former PL 4 and 5.

Second, the committee's proposed 403.7 had included both the risk/benefit and ordinary consumer tests for defect. In note on use 3, the committee explained that both of these tests had been included in PL 5 and, pending 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.” In the version of 403.7 included in the Court’s appendix, the Court deleted the risk/benefit test from the definition of defect.

Two other instructions that the Court preliminarily approved shed some light on the definition of defect--the statement of issues in 403.15 and the affirmative defenses in 403.18. The committee framed the issues for the jury in 403.15d in terms of three tests: manufacturing defect, ordinary consumer, and risk/benefit. When the Court preliminarily approved instruction 403.15d, it deleted the risk/benefit test.

In 403.18b, the instruction on affirmative defenses, the committee proposed listing the “**risk/benefit defense**,” which is “**whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.**” The note on use stated that the defendant may be entitled to an instruction on an affirmative defense based on the risk/benefit test. The note states, “Pending 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 Supreme Court preliminarily approved this instruction and note on use.

Justice Pariente wrote a concurring opinion to give guidance to this committee. She suggested that “the definitions of manufacturing defect and design defect [in 403.7] should be kept separate in order to avoid confusion.” She pointed out that the proposed committee note correctly states that the risk/benefit test does not apply in cases involving an unintended manufacturing defect.

Justice Pariente’s concurrence also contains a helpful discussion of the unsettled state of the law regarding whether the definition of a design defect:

Because this Court has not yet determined that issue and the definition of design defect is in a state of flux in Florida, I agree that the best course of action is to retain the current instructions on design defect, which have been in use since the 1980s, until this Court can reach a definitive substantive decision on this issue, including whether to adopt the Restatement (Third) of Torts regarding the definition of design defect. That decision should be made in the context of a case or controversy and not through an amendment to the jury instructions.

(J. Pariente concurring op., p. 10). Justice Pariente’s point is well-taken.

### **C. Scope of the revisions needed.**

Judge Barton spoke with Tom Hall, the Clerk of the Florida Supreme Court, to get clarification on the scope of the revisions contemplated in the decision. Following this, in June 2012, Judge Barton, sent an e-mail to Clerk Hall requesting clarification on several issues, including the following:

1. According to the May 18, 2012 Corrected Opinion ("Opinion"), Sections 403.10 and 403.15 proposed in Report No. 09-10 ("the Report") were preliminarily approved as proposed, but those two sections contained in the Appendix to the Opinion have been modified. Conversely, the Opinion indicates that section 403.18 is approved as modified, but Section 403.18 contained in the Appendix does not appear to modify the Committee's proposal contained in the Report. Should the Committee infer that Sections 403.10, 403.15 and 403.18 contained in the appendix to the Opinion are what the Court approved?

\* \* \*

4. The Committee in Sections 403.7 and 403.15(d) submitted essentially the same description of strict liability. The Court in its opinion rejected Section 403.7 but preliminarily approved Section 403.15(d). Should the Committee revise both sections, or should the Committee revise Section 403.7 based on the language contained in Section 403.15(d)?

The committee has not received a response to this e-mail.

The drafting committee debated the scope of the revisions to instruction 403.7 intended by the Court. The decision itself does not state it is rejecting the risk/benefit test, which might be expected if the Court intended this type of major



change from the existing instructions. The instructions preliminarily approved by the Court appear to be in conflict. On one hand, the Court preliminarily approved both instructions 403.15d and 403.18b, which do not list the risk/benefit test as an element. On the other hand, the Court also preliminarily approved the note on use to instruction 403.18b, which states that the instructions take no position on whether the risk/benefit test is an element or affirmative defense.

Justice Pariente raised a good point in the oral argument and in her concurring opinion that the risk/benefit test has been part of the jury instructions for 25 years. Historically, the role of the jury instructions committee has not included making new law. These substantive issues are typically settled in the context of a case or controversy.

In addition, cases decided after the committee filed its initial report hold that the risk/benefit test applies to design defect cases. See Union Carbide Corp. v. Aubin, \_\_\_\_ So. 3d \_\_\_\_, 2012 WL 3587127 (Fla. 3d DCA Aug. 22, 2012) (revised on motions for rehearing or certification); Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc., 48 So. 3d 976, 997 (Fla. 3d DCA 2010). The committee note cited several cases that had recognized 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).

Several members of the public who filed comments disagreed with this note and cited the new Agrofollajes decision from the Third District. The decision in Agrofollajes adopted the definition of defect found in the Restatement (Third) of Torts, Products liability. The decision held that reversible error occurred because the jury was instructed on the ordinary consumer test in a design defect case. Instead, the jury should have been instructed on only the risk/benefit test.

Several justices expressed concern at the oral argument that the committee had not fully considered the public comments, including on whether the instruction and note should specifically address the risk/benefit test. Given this recent precedent from the Third District requiring the risk/benefit test, it seems premature to delete the risk/benefit test from instruction 403.7. As Justice Pariente suggested, the courts should resolve this issue in the context of a case or controversy.

The drafting committee also e-mailed Larry Stewart, who was instrumental role in submitting the original report to the Court. Mr. Stewart interprets the

Supreme Court decision as directing the committee to define defect in 403.7 using the language found in former instructions PL 4 and 5. He believes that the Court's failure to direct the committee to make a similar change to instruction 403.15d was an oversight.

#### **D. Recommendations**

We recommend using the language of instruction 403.7 found in the appendix to the Supreme Court's decision as a starting point. The committee should make the following revisions:

1. Separate the definitions of manufacturing defect and design defect, similar to former instructions PL 4 and PL 5.

2. Use both the consumer expectations and risk/benefit tests to define product defect, using the language found in former instructions PL 4 and PL 5. Update the notes on use to include recent decisions on the test for defect.

3. Revise instruction 403.15d, issues on the claim, consistent with the revisions to instruction 403.7.

4. No changes are needed to instruction 403.18, stating that the defendant may be entitled to an instruction on the risk/benefit test as an affirmative defense.

**The suggested revisions to instructions 403.7 and 403.15 began with the language found in the appendix to the Court's decision with all red-lining removed. All underlined/strike-through text shows changes from the version in the Court's appendix)**

403.7      STRICT LIABILITY  
(Reserved)

**a. Manufacturing defect**

**A product is defective if from a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] and the product is expected to and does reaches the user or consumer without substantial change affecting that condition.**

**A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.**

**b. Design defect**

**A product is defective from a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.**

**A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [or] [the risk of danger in the design outweighs the benefits].**

## NOTES ON USE

1. A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). ~~In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product]”: “was not built according to its intended design [or] because the product ....”~~ The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981).

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *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). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: Products Liability to define a product defect. See *Union Carbide Corp. v. Aubin*, \_\_\_\_ So. 3d \_\_\_\_, 2012 WL 3587127 (Fla. 3d DCA Aug. 22, 2012) (revised on motions for rehearing or certification); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc.*, 48 So. 3d 976, 997 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the ordinary consumer test. See *Agrofollajes*, \_\_\_\_, 48 So. 3d at 997. Pending 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

risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.

4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. The decision in *Force* did not directly address correctness of these instructions. ~~Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, \_\_\_ So.2d \_\_\_, 33 FLW S963 (Fla. 2008). See also *Force* at 107. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*.~~

5. When strict liability and negligence claims are tried together, to clarify differences between them 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

6. See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution.

### **403.15 ISSUES ON MAIN CLAIM**

The [next] issues you must decide on (claimant's) claim against (defendant) are:

...

*d. Strict Liability -- Manufacturing Defect:*

**whether (the product) [was not built according to its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] ~~[(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer]~~ [or] ~~[the risk of danger in the design outweighed the benefits]~~ and (the product) reached (claimant) without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*e. Strict Liability -- Design Defect:*

**whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).**

*f. Strict Liability — Failure to Warn:*

**whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*g. Negligence:*

**whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*h.g. Negligent Failure to Warn:*

**whether (defendant) negligently failed to warn about particular risks involved in the use of (the product), and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**



**Memo to: Products Liability Sub-Sub-Committee on Crashworthiness**  
**From: Liz Russo**  
**Date: August 27, 2012**  
**Re: Draft instructions for claims based on lack of crashworthiness**

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Dear John and Ralph -

After mulling this over some and coming up with some places where crashworthiness claims *could* be discussed in the jury instructions (as discussed in a section below), I am not entirely convinced that there *should* be special instructions on this subject. The 2011 Legislative was very clear about overruling *D'Amario*, and seemingly in the sense of treating an enhanced injury/crashworthiness defendant like any other defendant in the suit. The Session Law notes to the 2011 amendment to §768.81, Fla. Stat. included the following section:

**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.

The pertinent portions of the actual amendments to the statute first supply the following definitions pertinent to crashworthiness:

(1) **Definitions.**--As used in this section, the term:

(a) **"Accident"** means the events and actions that relate to the incident as well as those events and actions that relate to the alleged defect or injuries, including enhanced injuries.

\* \* \*

(c) **“Negligence action”** means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.

(d) **“Products liability action”** means a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. **The term includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product.** The substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action.

§768.81(1)(a), (b), and (d).

The substantive section on apportionment now reads:

**(3) Apportionment of damages.**--In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

(a) 1. In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.

2. In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of

apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

- (b) **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.**

§768.81(3).

It seems to me that the point of these amendments is to make sure that crashworthiness defendants are to be treated just like any other defendant, and that fault is to be apportioned amongst defendants with all having equal footing. Thus, the statement in §768.81(3)(b) above that: "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" seems less directed to requiring a special instruction be devised for crashworthiness defendants than to say that a regular apportionment of fault instruction is to be given. [Of course, we do not currently *have* a regular apportionment of fault instruction for products liability actions, but the Legislature was clear that a products liability action is a negligence action, so the idea would be that a regular negligence apportionment instruction is to be given].

I know that we are not going through this exercise of trying to devise a crashworthiness jury instruction because we think that the Legislature has told us to do so, and therefore it is not of paramount importance what the Legislature may have meant by including the "the jury shall be appropriately instructed" sentence in the statute. But, in looking at the entirety of the Legislature's changes to §768.81, I am fairly convinced that the accent in this sentence is on the "appropriately instructed by the trial judge *on the apportionment of fault in products liability actions*," rather than on the "appropriately instructed," as in have a special instruction describing the crashworthiness defendant and/or the basis for

its liability.

So, I toss out for your consideration the idea that maybe what should happen under the statute is that a crashworthiness defendant should just be treated like any other negligence defendant, without calling any particular attention to its status as a crashworthiness defendant or to why a crashworthiness defendant is considered liable even though it did not cause the accident. It may be that a jury would not think that much of it if the parties at trial have presented evidence as to who was at fault for the accident right alongside of evidence as to how the vehicle design contributed to the severity of the injuries, and then simply asked to plop down their percentage of fault findings without further explanation.

Every attempt to explain why crashworthiness defendants should be treated the same as the other defendants is like defending a negative. By saying, you, members of the jury, should just think of this crashworthiness defendant the same as the other defendants when you are apportioning fault, might (a) make the jurors think “and why wouldn’t we?”, and/or (b) require such a convoluted explanation of the concept of “enhanced injury” claims that the Legislature’s point is defeated.

It was, after all, *D’Amario* that insisted that crashworthiness defendants *were* different for apportionment purposes, for evidentiary purposes (like relevance), etc. The Legislature is now insisting that no, they are *not* different. So, trying to tell a jury about crashworthiness defendants almost requires a history of how we *used to* make a distinction because of these old cases *Evancho/D’Amario* cases, but they are not good law anymore, so . . . Doesn’t seem like it could ever be proper fodder for jury instructions.

Maybe I am just being nutty about this, but that was kind of how it was striking me as I tried to come up with instructions.

That said, I set out next the possible places that I saw that crashworthiness concepts *might* go or that we could we *could* make changes or additions. I went through the instructions in order, considering possible spots where we might conceptually try to tell the jury something about crashworthiness, so I go through in order below.

\* \* \* \* \*

## **401.2 SUMMARY OF CLAIMS**

**The claims [and defenses] in this case are as follows.  
(Claimant) claims that (defendant) was negligent in  
(describe alleged negligence) which caused [him] [her]  
harm.**

It seemed that we could give a brief description of a crashworthiness claim under 401.2.  
Maybe something like this:

**The claims [and defenses] in this case are as follows.  
(Claimant) claims that (defendant) Ford Motor Company was  
negligent in designing its product the Ford Bronco, which  
caused claimant to sustain greater injuries in the accident.**

That would not be an actual change to the instructions, because we don't give examples  
of how you describe the negligence of given defendants.

Back when we had product liability instructions, another description of the claim could  
have been:

**The claims [and defenses] in this case are as follows.  
(Claimant) claims that the design of (defendant) Ford Motor  
Company's product the Ford Bronco was defective, which  
caused claimant to sustain greater injuries in the accident**

But again, these would just be a place that crashworthiness claims could be described. It  
doesn't assist much with the task of "drafting a crashworthiness instruction."

\*\*\*\*\*

## **401.4 NEGLIGENCE**

**Negligence is the failure to use reasonable care, which is  
the care that a reasonably careful person would use under  
like circumstances. Negligence is doing something that a  
reasonably careful person would not do under like**

**circumstances or failing to do something that a reasonably careful person would do under like circumstances.**

This negligence instruction was the next possible place to consider whether something special could be said to address crashworthiness. I don't see making any changes here.

It is just as easy to argue a crashworthiness theory under the standard negligence instruction as any other negligence theory.

I think the same thing is true, by the by, about arguing lack of crashworthiness as a product defect. Whatever the definition of design defect is going to end up (Restatement Second - as the Supreme Court says, or Restatement Third, as the Third District currently says), any plaintiffs' lawyers worth their salt can fit the claimed defect into *whatever* the selected verbiage is.

\*\*\*\*\*

#### **401.12 LEGAL CAUSE**

##### **a. Legal cause generally:**

**Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.**

##### **b. Concurring cause:**

**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] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].**

**c. Intervening cause:**

**Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:\***

**\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**

Legal cause was the next possible slot. But, here, too, it seems to me that the Intervening Cause instruction is sufficient unto the day. Because while the enhanced injuries occur after the negligence of the vehicle operators', the negligence in product design comes before the accident happens. And the crashworthiness theory is all about being able to foresee that your motor vehicle products may get into crashes, so how do you make them not cause worse injuries to occupants.

We could conceivably try either to come up with a whole new "preceding cause" paragraph, or to modify the "intervening cause" instruction, albeit by riding a tad roughshod over its actual origins. I doubt that either of these ideas will be well received. The *Legal Cause* instruction is so sacrosanct. I tried fooling around with those modifications, but they really do not work, given that the crashworthiness defendant's negligence actually precedes that of the drivers.

\*\*\*\*\*

## **401.18 ISSUES ON PLAINTIFF'S CLAIM — GENERAL NEGLIGENCE**

**The [next] issues you must decide on (claimant's) claim against (defendant) are:**

**a. Negligence, generally:**

**whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

**b. Two drivers' negligence:**

**whether (defendant) or (defendant) was negligent or whether both were negligent in operating the vehicles, and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

The 401.18 Issues on Plaintiff's Claim is a place where the crashworthiness concept will have to be included, with something along these lines:

whether (defendant) was negligent in operating his vehicle, whether (defendant) Ford Motor was negligent in designing its vehicle, or whether both were negligent, and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

This does not result in a jury instruction or in any modifications to the current instructions and notes on use as we don't give examples to 401.18.

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## 401.22 DEFENSE ISSUES

\* \* \*

### 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 that [negligence] [fault] [responsibility] was a contributing legal cause of [loss] [injury] [or] [damage] to (claimant, decedent or person for whose injury claim is made).**

#### NOTE ON USE FOR 401.22f

**See F.S. 768.81 (1993); Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). 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 is the actual apportionment instruction that we already have. It seems to be fine without modification. Changing the Note on Use to refer to §768.81 (2011) rather than §768.81 (1993) may, without more, be the most expedient way of implementing the Legislature’s intent of treating those at fault for a vehicle accident as being *in pari delicto* with a crashworthiness defendant

\*\*\*\*\*

I then also thought about whether there was something we could do with the Legislature’s definition of “accident” in combination with only other place where they used the word, which would give us these two sections to work with:

[The term] “accident” means the events and actions that relate to the incident as well as those events and actions that relate to the alleged defect or injuries, including enhanced injuries.

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.

I am sure you two will be more creative than I am being, but I was uninspired by either of these provisions as potential jury instructions. I thought about a preemptive instruction as to the meaning of accident, but that in turn would require a definition of “enhanced injuries.” Too sticky wickets.

When you make your findings as to the fault of the parties on your verdict form, you will determine the percentage of fault, if any, of each defendant [or “party,” if comparative negligence is an issue] that contributed to the accident. “Accident” means the events and actions that relate to the incident as well as those events and actions that relate to the alleged defect or injuries, including enhanced injuries [injuries that were caused or made worse by negligent design of a vehicle] .

Unclear and unwieldy, in my opinion.

\*\*\*\*\*

Tapped out of ideas as to instructions. It may be that doing a Model Instruction will be better able to do the trick. I’ll try that, too, but not just this minute.

Liz

**Debra Gregory**

---

**From:** Kest, John [ctjujk1@ocnjcc.org]  
**Sent:** Monday, September 10, 2012 11:13 AM  
**To:** Elizabeth Russo; skywayra tds.net; Baggot, Brian  
**Cc:** Rebecca Mercier-Vargas  
**Subject:** RE: Crashworthiness  
 Liz, Ralph and Brian,

My jury finally went out to deliberate, so I have a few minutes to revisit the crashworthiness instruction project before they come back. Once again, Liz, great job.

I still tend to believe, as Liz suggests and as I believe Ralph has said, that we may not need a "whole set of instructions" on crashworthiness and enhanced injuries in light of the legislative change. If the stated legislative intent is to treat enhanced injuries as part of the whole injury and simply apportion it by percentage amongst the various parties, and non-parties, the concept is relatively straightforward.

However, I am troubled about the phrase "[t]he jury shall be appropriately instructed by the trial judge on apportionment of fault in products liability actions ...." It seems pretty clear that trial judges are being told to do something specific in crashworthiness cases, over and above what is given in standard instructions. It may be as simple as setting forth clearly that enhanced injuries are to be treated by simply apportioning out responsibility – as in a note on use -- or it may require more detailed treatment. Conversely, to treat it too specifically or to create special instructions is sending the message to the jury, and the attorneys, that crashworthiness cases are different and are to be treated differently hence the need for separate instructions.

Having gone through this utterly circular reasoning, I keep coming back to the thought that maybe some simply minor modifications or additions to the instruction is the best. For the lay jury, crashworthiness is a foreign concept. Maybe a simple instruction in the definition section (such as adopting the statutory definition in part) setting out some explanation of products liability and crashworthiness might be helpful. Liz has some of this in her suggestions to 401.2.

Liz seems to take a little issue with, what I read as, why worry at all as the jury would understand that one would apportion to the manufacturer anyway without being so told. Liz, maybe I am reading you memo wrong. My experience both in practice and on the bench is that jurors are perceptive, but may miss some concepts such as enhanced injury. For example, when I have a drunk driver run a car off the road which rolls over and the passenger is badly injured and/or killed, the jury has trouble with enhanced injury which was caused by negligent manufacturing and just looks to the drunk driver.

I do have some concern about 401.12. Enhanced injury in a crashworthiness case usually results from actions taken or not taken BEFORE the negligence of the active tortfeasor occurred. Each of the sub parts deal with "caused at the time," "concurrently caused" or "subsequent cause." This is the one area I think we may need to consider a subsection (d) on enhanced injury resulting from actions that occurred before the active tortfeasor's negligence – "Liz" term = "preceding cause." **I do think it would be helpful to consider adding a sub (d).** I would not want to play with (a), (b), (c) because as Liz notes they are "sacrosanct."

I agree that under 401.18 some basic language could be included to the "cafeteria list" to make it easier for practitioners. I also agree that the body of 401.22 really does not need modification. It appears to say what the legislature wants as it is presently constructed.

Sorry about the rambling. I have to get back to some emergency hearings and do not know when I can get back to this. Unfortunately, I am not going to be able to be on the telephone meeting on Thursday at noon as I am teaching a brown bag lunch to 75 attorneys at that time.

John

John Marshall Kest  
Circuit Judge, Ninth Judicial Circuit

---

**From:** Elizabeth Russo [mailto:Liz@russoappeals.com]  
**Sent:** Wednesday, September 05, 2012 2:09 PM  
**To:** skywayra tds.net  
**Cc:** Kest, John  
**Subject:** RE: Crashworthiness

Just wasn't sure whether the deliberations had been completed.

Elizabeth Russo, Esquire  
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**From:** skywayra tds.net [mailto:skywayra@tds.net]  
**Sent:** Wednesday, September 05, 2012 1:57 PM  
**To:** Elizabeth Russo  
**Cc:** Kest, John  
**Subject:** Re: Crashworthiness

I thought John was considering the issue of whether we should propose instructions given the state of the law. I do not see why we would work on instructions if the current instructions are accurate and proposing special instructions would be misleading given the state of the law.

Ralph

On Wed, Sep 5, 2012 at 1:47 PM, Elizabeth Russo <[Liz@russoappeals.com](mailto:Liz@russoappeals.com)> wrote:  
Have we decided what we want to do with the wonderful world of crashworthiness jury instructions ? I think I had better come up with some type of report, if not instructions, before the telephone conference next week.

Thanks for any guidance.

Respectfully,

Liz

Elizabeth Russo, Esquire  
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--

Ralph Artigliere  
[skywayra@tds.net](mailto:skywayra@tds.net)

**Debra Gregory**

---

**From:** Elizabeth Russo [Liz@russoappeals.com]  
**Sent:** Monday, September 17, 2012 3:32 PM  
**To:** Kest, John; skywayra tds.net; Rebecca Mercier-Vargas  
**Cc:** david@salesappeals.com; Laura.Whitmore@arlaw.com; farmergm@att.net; gfox@stfbllaw.com; twboyer@coj.net; Barton, James; Jodi B Jennings; jlang@carltonfields.com; lacone, Diane; Baggot, Brian; Porter, Shelli  
**Subject:** RE: SJL products subcommittee: summary of conference call on Sept. 12

Dear Judge Kest –

I think that the way to look at the intervening cause instruction – and why I think it works – is that it is the design defect negligence that occurs first – in an industry that knows that its products are going to be crashing around the streets of the US. So it is their initial negligence that acts as a cause of the Plaintiff's greater injuries even though the negligence of the vehicle-driving tortfeasors intervenes because that intervening driving negligence was itself foreseeable. Which is the essence of crashworthiness liability.

And then the driver's negligence as legal cause along with that of the car manufacturer is covered by concurring. Like, the manufacturer's negligence is just riding around dormant with the vehicle until activated by the negligence of another tortfeasor crashing into the vehicle, at which time the two combine to cause injury – greater injury than it would otherwise have been in the case of the manufacturer's negligence.

That is how it struck me, anyway.

Respectfully,

Liz

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**From:** Kest, John [mailto:ctjuk1@ocnjcc.org]  
**Sent:** Monday, September 17, 2012 3:15 PM  
**To:** skywayra tds.net; Rebecca Mercier-Vargas  
**Cc:** Elizabeth Russo; david@salesappeals.com; Laura.Whitmore@arlaw.com; farmergm@att.net; gfox@stfblaw.com; twboyer@coj.net; Barton, James; Jodi B Jennings; jlang@carltonfields.com; Iacone, Diane; Baggot, Brian; Porter, Shelli  
**Subject:** RE: SJI products subcommittee: summary of conference call on Sept. 12

Thank you. Sorry I could not be on the call with the crashworthiness subcommittee. Trials never seem to go away.

I appreciate the information, Rebecca. I still have some concerns on the Intervening cause 401.12(c) however. I keep getting requests on crashworthiness cases that 401.12(c) is not enough because it speaks of it (1) "occurring after the negligence occurs" (2) "other cause" being "itself reasonably foreseeable" – which crashworthiness generally is not, and (3) several others arguments. The argument always brought up is, "judge, just look at the title, it says intervening, this crashworthiness negligence was not intervening it was anteceding the auto accident."

Enough said, we can talk about it at the meeting. Thanks again for the information.

John Marshall Kest  
 Circuit Judge, Ninth Judicial Circuit

---

**From:** skywayra tds.net [mailto:skywayra@tds.net]  
**Sent:** Friday, September 14, 2012 7:12 PM  
**To:** Rebecca Mercier-Vargas  
**Cc:** Elizabeth Russo; david@salesappeals.com; Kest, John; Laura.Whitmore@arlaw.com; farmergm@att.net; gfox@stfblaw.com; twboyer@coj.net; Barton, James; Jodi B Jennings; jlang@carltonfields.com; Iacone, Diane; Baggot, Brian; Porter, Shelli  
**Subject:** Re: SJI products subcommittee: summary of conference call on Sept. 12

Thank you for the report. I concur with the results.

Ralph

On Thu, Sep 13, 2012 at 3:17 PM, Rebecca Mercier-Vargas <[rvargas@kwcvpa.com](mailto:rvargas@kwcvpa.com)> wrote:  
 Hello, members of the products liability subcommittee:

I am pleased to let you know that we have a new member, Brian Baggot, who was recently appointed to the SJI. Brian is a partner at Rumberger, Kirk & Caldwell and his primary practice is representing defendants in products cases. When you are e-mailing him, please also copy his secretary Shelli Porter, whose address is above.

Thank you to Liz, Brian, and Laura for participating in the conference call today. I appreciated your input. We also considered the comments of Ralph and Judge Kest, which had been submitted in advance. Here is a summary of our call:

**Crashworthiness:** Liz explained the recommendation in her memo that it is not necessary to have a standard crashworthiness instruction. Section 768.81(3) expressly states that it overrules D'Amario and applies retroactively. Under section 768.81, the

jury is to consider the fault of all of those who contributed to the accident when apportioning fault.

Brian reported that there are no appellate cases addressing whether retroactive application of the statute is constitutional. However, Brian is aware of approximately six trial court cases applying the statute retroactively. Liz expressed the opinion that until an appellate decision rules the statute cannot be retroactively applied, our committee is bound to follow it.

Liz, Laura and I felt that the intent of the statute is to treat defendants in crashworthiness cases like all other defendants. For this reason, the jury can be given standard causation instructions explaining that an injury can have more than one cause and standard damages instructions explaining how to apportion damages. In an e-mail, Judge Kest suggested that we might need to modify the causation instruction (401.12) to make clear even though any fault of the manufacturer happened long BEFORE the negligence of the drivers, it can still be considered a legal cause. We discussed this concern and felt that the instruction on intervening cause 401.12c, already adequately covers this.

Brian felt that we may still need a special instruction in crashworthiness cases 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.

**Brian is going to draft a proposed crashworthiness instruction for the subcommittee to discuss at our next call. The consensus during the call was that a special crashworthiness instruction will not be needed in light of the statute. Liz will draft a proposed note explaining the reason no standard instruction is needed.**

**Design defect:** I gave an overview of my memo, which recommended revising the instruction on defect in 403.7 and 403.15d to do three things: (1) give separate definitions of manufacturing and design defects; (2) use the alternative tests for risk/benefit and ordinary consumer, pending further development in the law; and (3) update the notes on use to include the new cases from the Third District adopting the Restatement (Third) of Torts and the risk/benefit test. **We agreed to approve the draft instructions and notes on use as set forth in the memo.**

**Inferences:** Laura agreed to draft an instruction on the government rules defense. We tabled the discussion of Cassisi instruction and memo Gary circulated until our next conference call. Brian and I will circulate government rules instructions submitted in



other cases.

Our next conference call is scheduled for **Thursday, September 27 at noon**. We will be discussing the crashworthiness instruction and inference instructions. I would appreciate it if you circulate the instructions to be discussed at that call by next Friday, Sept. 21, or the following Monday-Tuesday at the latest.

Thanks very much,  
Rebecca

Rebecca Mercier Vargas, Esq.  
Board Certified Appellate Attorney

**KWC&V**

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Ralph Artigliere  
[skywayra@tds.net](mailto:skywayra@tds.net)

**Debra Gregory**

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**From:** Laura Whitmore [Laura.Whitmore@arlaw.com]  
**Sent:** Saturday, September 22, 2012 10:13 AM  
**To:** Laura Whitmore; Rebecca Mercier-Vargas; farmergm@att.net; david@salesappeals.com; twboyer@coj.net; Baggot, Brian  
**Cc:** Barton, James ; Jodi B Jennings; Elizabeth Russo; ctjujk1@ocnjcc.org; gfox@stfblaw.com; skywayra@tds.net; Joseph Lang  
**Subject:** RE: products liability subcommittee - inference drafting group  
**Attachments:** FSJIC-Gov. Rules. Instr. Report to PL Subcommittee.doc

Trying this again . . . my apologies to those of you getting this twice. I didn't have the full subcommittee distribution on the prior email. Please see below and attached. Thanks!

Best,

**Laura K. Whitmore, Esq.**  
**Adams and Reese, LLP**  
**101 E. Kennedy Blvd., Ste. 4000**  
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**p: (813) 402-2880**  
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**[laura.whitmore@arlaw.com](mailto:laura.whitmore@arlaw.com)**  
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**From:** Laura Whitmore  
**Sent:** Saturday, September 22, 2012 10:09 AM  
**To:** 'Rebecca Mercier-Vargas'; farmergm@att.net; david@salesappeals.com; twboyer@coj.net; Baggot, Brian  
**Cc:** Barton, James ; Jodi B Jennings; Elizabeth Russo  
**Subject:** RE: products liability subcommittee - inference drafting group

Dear All:

Attached for your review and consideration is my Report to the Products Liability Subcommittee on the Government Rules jury instruction. I look forward to speaking with you all on our next full subcommittee call, Thursday 9/27.

Have a great weekend!

**Laura K. Whitmore, Esq.**  
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**[laura.whitmore@arlaw.com](mailto:laura.whitmore@arlaw.com)**  
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---

**From:** Rebecca Mercier-Vargas [mailto:rvargas@kwcvpa.com]  
**Sent:** Thursday, September 13, 2012 1:23 PM  
**To:** Laura Whitmore; farmergm@att.net; david@salesappeals.com; twboyer@coj.net; Baggot, Brian  
**Cc:** Barton, James ; Jodi B Jennings; Elizabeth Russo  
**Subject:** products liability subcommittee - inference drafting group

At our conference call today, Laura graciously agreed to draft a government rules jury instruction. Our next products conference call is scheduled for Thursday, September 27 at noon. During that call, we will be discussing the Cassissi inference instruction Judge Farmer circulated previously, along with the government rules instructions.

To get the ball rolling, I copied below a jury instruction on government rules that we submitted in a case on behalf of the plaintiff. Brian, I could not find the instruction you submitted on behalf of the defense in this case. Could you send us a sample government rules instruction you have submitted recently?

Thanks. I would appreciate it if we could circulate the draft government rules instruction to the full products subcommittee by next Friday, Sept. 21, or the next Monday-Tuesday at the latest.

**The following are relevant in the determination of whether a product was defective or was negligently designed or whether there was negligence in the testing of the product.**

- a. Compliance with federal regulations, or standards required as a condition for selling or distributing a product and that are designed to prevent the type of harm that allegedly occurred and that are relevant to the event causing the death or injury.**
- b. Following the custom of the industry or trade in which a manufacturer was engaged.**
- c. The state of the art of scientific and technical knowledge and other circumstances that existed at the**

**time of manufacture**

**If you find that Kia manufactured this vehicle in compliance with federal safety standards intended to prevent this type of injury or followed the custom of the industry, you can consider that fact, together with the other facts and circumstances, in deciding whether such the product was defective or negligently designed or negligently tested.**

Thanks very much.

Rebecca

Rebecca Mercier Vargas, Esq.  
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**Memo to: Products Liability Subcommittee**  
**From: Laura Whitmore**  
**Date: September 21, 2012**  
**Re: Draft instruction for the Government Rules Defense (§ 768.1256, Florida Statutes)**

---

**RECOMMENDATION: Take No Action.**

Fellow subcommittee members:

Our subcommittee Chair, Rebecca Vargas, asked that I evaluate and draft a proposed jury instruction for the Government Rules Defense provided in section 768.1256 of the Florida Statutes. For those of you who were on the Committee back in 2009, you likely will remember the Committee's prior efforts to address this statute. For those who were not, I am providing below a brief history of the Committee's struggle with this instruction, and the evolution of the Committee's decision ultimately not to provide one.

For the reasons discussed herein, and because it is my conclusion that there has been no further development in the law that might provide us additional guidance on how to proceed this time around, I recommend we adhere to our prior decision to only provide a Note on Use identifying the uncertainty in the law. In the alternative, if the subcommittee decides to move forward with an instruction, I have proposed a draft starting point with additional points of consideration.

## **I. Brief History On the Government Rules Instruction**

The Committee previously drafted a Government Rules Defense instruction, which was intended to be part of instruction 403.11 (Inference of Product Defect or Negligence) and the parallel defense issues instruction, 403.18. The proposed Government Rules instruction stated:

**If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation or standard), you should presume that [(the product) was defective] [(defendant) was negligent] unless (defendant) proves otherwise by the greater weight of the evidence. You may consider this presumption together with all the other facts and circumstances in evidence, in determining whether [the product was defective] [(defendant) was negligent].**

The proposed instruction was published for comment in the December 15, 2008 Florida Bar News. Comments were received. The Committee then revisited this instruction at the March 2009 full Committee meeting. After lengthy discussion at that meeting, the Committee ultimately decided not to provide an instruction because it is not clear what type of presumption this statute involves. As a result, the Committee instead decided to provide the following Note on Use:

1. Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304. Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

Accordingly, no instruction was submitted to the supreme court with the products liability report. The above Note on Use was proposed for both instruction **403.11** (inference of product defect or negligence),

which the supreme court referred back to the Committee, and instruction **403.18** (defense issues), which the court preliminary approved.

Currently, the Committee has decided to circle back to the Government Rules Defense instruction and take a fresh look at it as a result of the time that has passed since the last attempt and the new membership on the Committee.

Given the considerable amount of effort involved in the last attempts at this instruction, I thought it might be a good starting point to pick up where the Committee last left off, instead of reinventing the wheel from scratch.

## **II. Statutory Language**

### **§ 768.1256. Government rules defense**

(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.

(3) This section does not apply to an action brought for harm allegedly caused by a drug that is ordered off the market or seized by the Federal Food and Drug Administration.

### **III. Instruction Initially Proposed By the Committee (V1)**

**If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation or standard), you should presume that [(the product) was defective] [(defendant) was negligent] unless (defendant) proves otherwise by the greater weight of the evidence. You may consider this presumption together with all the other facts and circumstances in evidence, in determining whether [the product was defective] [(defendant) was negligent].**

### **IV. March 2009 Committee Meeting Points Of Discussion That Should Be Considered As Part Of Our Second-Attempt At This Instruction:**

#### **Question (1):**

What does the defendant have to prove to rebut the presumption? You will see that the Committee's initial proposed instruction is not specific. One of the comments received after publication suggested the following language be added after "(defendant) proves:" "that the product did comply with or exceeded applicable statutes, codes rules, regulations or standards. If defendant has established by the greater weight of the evidence the product's compliance, there is no presumption of defect or negligence."

This comment set in motion the Committee's detailed analysis of what type of presumption really is at issue, and what the instruction must state.

At the March 2009 meeting, the Committee generally agreed with the public comment to add language about what the defendant must prove to rebut the presumption, revising the instruction to state:

**If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation or**



standard), **you should presume that [(the product) was defective] [(defendant) was negligent] unless (defendant) proves by the greater weight of the evidence that (the product) did comply with (describe applicable statute, code, rule, regulation or standard). You may consider this presumption together with all the other facts and circumstances in evidence, in determining whether [the product was defective] [(defendant) was negligent].**

This change prompted considerable discussion about what the true effect of the presumption is and what the defendant must do or prove in order to rebut it. The answer to this question depends on what type of presumption is afforded by the statute - - i.e. whether it is a vanishing presumption affecting only the burden of producing evidence, or whether it is a burden-shifting presumption, shifting the entire burden of proof.

**I do not think that this Committee can draft a correct instruction without knowing the answer to what type of presumption is at issue, and I think we are no more informed today than we were in 2009. I have researched whether there is any new case law or other authority on this statute that might provide us additional guidance. I only found one new case addressing the statute - - *In re: Fosamax Products Liability Litigation*, 742 F.Supp.2d 460 (S.D. N.Y. 2010) - - and I do not think this case is of much guidance, if any.<sup>1</sup>**

Therefore, I believe the Committee remains unable to draft a proposed instruction. To support my conclusion, I think it is helpful to show (from the March 2009 meeting minutes, with emphasis over the unsettled language) what led to the Committee's ultimate decision in March 2009 to abandon this instruction.

---

<sup>1</sup> In *In Re Fosamax*, the Court stated, "[t]he statute may entitle Defendant to a presumption provided that the jury found that it was in compliance with applicable FDA regulations, but it is not a complete bar against liability. To the extent that the jury believed Merck was entitled to a presumption, in light of the aforementioned evidence introduced at trial from which a jury could reasonably conclude that Fosamax is unreasonably dangerous, it also could have found that the presumption was rebutted."

Gunn, Bailey and Campo proposed the following re-write:

**If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation, or standard), this noncompliance creates a presumption that (the product) was defective or unreasonably dangerous. (Defendant) can overcome this presumption by proving by the greater weight of the evidence that the product was not defective and unreasonably dangerous.**

The Committee discussed, and came up with the following revised version:

**If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation, or standard), you should presume that (the product) was defective and unreasonably dangerous unless (Defendant) proves by the greater weight of the evidence that the product was not defective and unreasonably dangerous.**

**You may consider this presumption together with all the other facts and circumstances in evidence, in determining whether the product was defective or unreasonably dangerous.**

Gunn, Bailey, and Campo proposed the following re-write of the third paragraph:

**If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation or standard), this noncompliance creates a presumption that (the product) was defective or unreasonably dangerous. (Defendant) can overcome this presumption by proving by the greater weight of the evidence that the product was not defective and unreasonably dangerous.**

The Committee then considered the following alternative:

**Plaintiff claims that the product was defective because it failed to comply with (describe applicable statute, code, rule, regulation, or standard). You may presume that it was defective if you find that the product failed to comply with (describe applicable statute, code, rule, regulation or**

**standard). But if the defendant produces evidence that, despite its failure to comply with the (describe applicable statute, code, rule, regulation or standard), the product nevertheless had no defect, then you should determine whether the product was defective from all of the evidence in the case without any presumption.**

It was at this point that the Committee concluded an instruction could not be drafted without knowing what type of presumption is contemplated by the statute.

Therefore, my concern is that without any additional clarification about this statute and what type of presumption is involved, it will be an exercise in futility to try to resolve whether the instruction should (1) state, “may presume” or “must presume” or “should presume” or “creates a presumption” **and** (2) whether this presumption can be rebutted by defendant “proving by the greater weight of the evidence that the product was not defective and unreasonably dangerous” **or** by “produc[ing] evidence that, despite its failure to comply with the (describe applicable statute, code, rule, regulation or standard), the product nevertheless had no defect” **and**, (3) whether the presumption should be considered “together with all the other facts and circumstances in evidence, in determining whether the product was defective or unreasonably dangerous.”

## **V. Moving Forward**

If the subcommittee decides to move forward with this instruction, I think we need both an instruction for the defense and one for the claimant, since the presumption works both ways. I think this is possible, though convoluted, to do in a single instruction. Therefore, I propose we begin working off of the following two possibilities (one that combines for claimant and defendant, and one that separates them out):

### **Option 1:**

**If you find that** (the product) **[complied with] [or] [failed to comply with]** (describe applicable statute, code, rule, regulation or

standard) **at the time** (the product) **was [sold] [or] [delivered], you should presume that** (the product) **[was] [or] [was not] defective [or] [(Defendant) [was] [or] [was not] negligent] unless [Claimant] [or] [Defendant] proves by the greater weight of the evidence that** (the product) **[did] [or] [did not] comply with** (describe applicable statute, code, rule, regulation or standard). **You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(defendant) was negligent].**

Option 2:

- A. **If you find that** (the product) **complied with** (describe applicable statute, code, rule, regulation or standard) **at the time** (the product) **was [sold] [or] [delivered], you should presume that** (the product) **[was not defective][or] [(Defendant) was not negligent] unless (Claimant) proves by the greater weight of the evidence that** (the product) **did not comply with** (describe applicable statute, code, rule, regulation or standard). **You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(Defendant) was negligent].**
- B. **If you find that** (the product) **[failed to comply with]** (describe applicable statute, code, rule, regulation or standard) **at the time** (the product) **was [sold] [or] [delivered], you should presume that** (the product) **[was defective [or] [(Defendant) was negligent] unless (Defendant) proves by the greater weight of the evidence that** (the product) **complied with** (describe applicable statute, code, rule, regulation or standard). **You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [or] [(Defendant) was negligent].**

On our last attempt, the Committee also spent considerable time addressing whether the two presumptions (1) defect and (2) negligence should be addressed in separate instructions. Given the Committee's decision to abandon the instruction, this issue was not fully vetted to resolution. This probably is a point of consideration worth revisiting.

# CASSIS/ INFERENCE AS JURY INSTRUCTION

by Gary M. Farmer

## I. Cassisi In Florida Courts

### **A. Adoption of Inference of Defect From Malfunction In Normal Operation By 1st DCA**

Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st DCA 1981). Plaintiff had purchased a clothes dryer and used it in normal operation for 19 months until one day when, during her absence, her house was destroyed by a fire apparently originating in the dryer. Her expert was unable to identify a specific defect within the dryer other than a probable electric short. Defendant was given a summary judgment upon its contention that plaintiff had the burden of proving a specific defect, which she failed to do. The First District reversed the summary judgment, holding:

There is, however, one type of proof of product defect, which, from a given set of circumstances, aids a plaintiff in meeting his burden by creating a legal inference that the product was defective both at the time of the injury and at the time it was within the control of the supplier. This inference arises from the occurrence of the accident itself, and the case most often cited as so holding is *Greco v. Bucciconi Engineering Co.*, 283 F.Supp. 978 (W.D.Pa.1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969). We approve the *Greco* rule and apply it to the case now before us. That rule, applying Pennsylvania law, simply states that when a product malfunctions during normal operation, a legal inference, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration....

The *Greco* inference is somewhat analogous to the *res ipsa loquitur* inference applicable to negligence cases.... Both legal inferences are similar since they are based upon common sense assumptions that the occurrence of

the accident is such that in the ordinary course of events it could not have happened as to res ipsa, without the negligence of the person in control, and as to the other, without the product's defective condition. Additionally, both inferences are founded upon strong policy considerations that aid a plaintiff in meeting his burden of proof when direct proof of negligence or product defectiveness is wanting."

[T]he facts essential for the inference's application are simply proof of the malfunction during normal operation....

Since the procedural effect of the *Greco* inference is identical to that of the res ipsa inference, it is more accurate to state that neither the burden of proof, nor any burden of producing evidence is cast upon the defendant 'except in the very limited sense that if he fails to do so, he runs the risk that the jury may ... find against him.' Thus, the practical result of the inference is that if the manufacturer wishes to avoid a jury's consideration of the issues, it must offer evidence showing there are no genuine issues of material fact to be resolved by a jury rather than suggest possible reasons for the product's malfunction.

In short, the Cassisi court concluded that among all the reasonable inferences to which plaintiff was entitled in opposing defendant's motion for summary judgment was an inference that the product was defective when it left the manufacturer. The Court did not venture -- nor did it have any occasion to do so -- to make any holding on how the inference would be applied at trial. Is the inference a bursting bubble, for example, that disappears upon the presentation of evidence to the contrary? Or does it stay in the case for the jury to consider along with all other evidence?

There have been several decisions after Cassisi addressing the inference in the context of summary judgment

and directed verdict, and only one addressed the application of the inference in submitting the case to the jury. These cases are considered in the following paragraphs.

**B. DCA Cases Adopting or Referring to Inference**

*(There is no ruling by the Florida Supreme Court addressing the inference.)*

1. Jones v. Heil Co., 566 So. 2d 565 (Fla. 1st DCA 1990), involved a directed verdict in favor of the manufacturer of the product. Plaintiff offered evidence to the effect that the machine had malfunctioned during normal operation. In reversing the directed verdict, the First District said:

under our holding in Cassisi, there was sufficient evidence presented to establish a prima facie case of product defectiveness for jury consideration of appellant's strict liability claim and, thus, for denial of appellee's directed verdict motion.

566 So.2d at 567.

2. Parke v. Scotty's Inc., 584 So. 2d 621 (Fla. 1st DCA), rev. denied, 592 So. 2d 682 (Fla. 1991), involves review of an order granting summary judgment in favor of defendant. Again, the First DCA held that the trial court had erred in requiring plaintiff to produce direct evidence of a specific defect to avoid summary judgment, citing Cassisi.

3. Ford Motor Co. v. Cochran, 205 So. 2d 551 (Fla. 2nd DCA 1967), cert. denied, 211 So. 2d 212 (Fla. 1968). This was

review of a judgment on a directed verdict in favor of plaintiff. It was actually decided before Cassisi. In this instance the DCA rejected defendant's argument that plaintiff had to prove a specific defect, saying it was an impossible burden and that "[t]he burden of the scientific limitations of our society should not be case on injured plaintiffs in circumstances such as existed in the instant case." 205 So. 2d at 553. Thus it is entirely harmonious with Cassisi.

4. McCarthy v. Florida Ladder Co., 295 So. 2d 707 (Fla. 2nd DCA 1974), is another summary judgment case decided before Cassisi. The product in question was destroyed or lost, and the trial court ruled that the absence of the product for examination and testing by the defendant was fatal to plaintiff's case. The Second DCA merely followed its Cochran holding and allowed an inference of defect without any requirement on claimant to prove a specific defect.

5. Brady v. Steyr-Daimler-Puch A.G. Werke Graz Austria, 429 So. 2d 1348 (Fla. 2nd DCA 1983), is the first reported decision after Cassisi. Here too the issue arose in the context of a defense motion for summary judgment. The claim involved a defective throttle in a Moped. Plaintiff's expert was unable to opine as to the cause of the malfunction. After



citing Cassisi, the Second DCA summarily reversed the summary judgment, saying:

On summary judgment the movant must show conclusively and unequivocally that genuine issues of material fact do not exist; of course, the burden on a party moving for summary judgment is greater than the burden which plaintiff must carry at trial. In this case, defendants failed to show conclusively that no defect in the moped could be proven at trial to have caused the accident and resulting injuries. [c.o.]

429 So. 2d at 1349. In short, the holding is that the failure of the defendant to demonstrate conclusively that the malfunction resulted from some cause other than a manufacturing defect was fatal to any summary judgment in its favor.

6. Thrasher v. Koerhing Co., 543 So. 2d 754 (Fla. 3d DCA 1988), is yet another summary judgment in a products liability case. Citing Cassisi, the Third DCA held that plaintiff is not required to produce testimony of an expert to contradict defendant's expert in order to avoid a summary judgment. Upon evidence of normal operation and malfunction, the court held, plaintiff is entitled to an inference that defendant would then have to disprove in order to earn a summary judgment in its favor.

7. Miller v. Allstate Ins. Co., 650 So. 2d 671 (Fla. 3d DCA), rev. denied, 659 So. 2d 1087 (Fla. 1995), is actually a

spoliation of evidence case, where the product itself had been lost or destroyed. The trial court had dismissed the action because plaintiff had failed to pursue products liability case against the manufacturer. The Third DCA held that plaintiff was required to pursue the products liability case against the manufacturer either before or simultaneously with his spoliation of evidence case, and that the failure to do so was fatal to his spoliation case.

8. Marcus v. Anderson/Gore Homes Inc., 498 So. 2d 1051 (Fla. 4th DCA 1986), involves a defective water heater in a new house. The trial court entered a summary judgment in favor of the builder on the claim by the home buyer. The claimant had produced evidence that the water heater was used normally and malfunctioned. The Fourth DCA held that plaintiff was entitled to the Cassisi inference to defeat the motion for summary judgment.

9. Warner v. Sony Corp. of America, 560 So. 2d 399 (Fla. 4th DCA 1990), involves a directed verdict in favor of a product manufacturer. The Fourth DCA held that plaintiff had presented a jury question sufficient to defeat a directed verdict. Citing Cassisi the DCA said: "[w]hen a product malfunctions during normal operations, a legal inference

arises that the product is defective, and the injured plaintiff thereby establishes a prima facie case for jury consideration." 560 So. 2d at 400.

**C. Fifth District on Cassisi**

Torres v. Matsushita Elec. Corp., 762 1014 (Fla. 5th DCA 2000), is a products liability case against the manufacturer of a vacuum cleaner. The product exploded and injured plaintiff during normal operation. The evidence as to the age of the product ranged from 1 to 7 years. Defendant moved to dismiss the claim because the vacuum cleaner was lost or destroyed by plaintiff's attorney. The trial court dismissed because defendant was prevented by the unavailability of the product from testing the product, checking for modifications or evidence of misuse, and from ascertaining whether the fire and explosion were caused by something other than a product defect. Plaintiff acknowledged that his only basis for proving a defect was the Cassisi inference. The Fifth DCA said:

The court in [*Cassisi*] explained that the most vivid portrayals of the...inference are those cases in which the product is consumed by the malfunction so that it is impossible to point with specificity to one of many possible causes. In such cases, the malfunction itself raises an inference that the product was defective and that the defect caused the malfunction. However, this inference may be rebutted, explains *Cassisi*, by proof of the product's age, the length of the product's use, the severity of its use, the state of its repair, its expected useful

life, and whether it was subjected to any abnormal operation.

762 So. 2d at 1016. The court added that:

Further, even if the vacuum is connected to this defendant, defendant has been denied the opportunity to determine the actual age of the particular vacuum, its length of service, the severity of its use, its state of repair, and whether it was subjected to any abnormal operation, and it was denied this opportunity because of *the negligence of plaintiff through her lawyer*. We have found no case in which the...inference has been applied when the product, rather than being destroyed by the malfunction, is unavailable because of plaintiff's negligent destruction of evidence. The extension of [*Cassisi*] to spoliation cases would be a precedent which invites fraud. [e.o.]

762 So. 2d at 1016-17. Plaintiff also argued an alternate, negligent design theory. In rejecting the use of the inference for that theory under the facts of the case, the Fifth DCA said:

Without [*Cassisi*], plaintiff cannot prevail on either theory. We are unwilling to extend [*Cassisi*] to spoliation cases. Therefore, even if the court should have merely stricken the expert witness and denied a [*Cassisi*] inference, rather than dismiss the action as it did, the effect is the same.

762 So. 2d at 1017.

The only thing on which all judges of the Fifth District did seem to agree was that, if this were not a case of spoliation by plaintiff's own agent, the Cassisi inference would result in an inference of product defect upon evidence of normal use and malfunction. Thus, Torres appears harmonious with the body of case law developed since Cassisi.

**D. Case Involving Jury Instruction to the Effect of the**

### Cassisi Inference

Only one court appears to have addressed whether, the case having been allowed to go to the jury, the jury should be instructed on the Cassisi inference. See Gencorp. Inc. v. Wolfe, 481 So. 2d 109 (Fla. 1st DCA 1985). The following text from the opinion itself is pertinent to issue of an instruction based on the Cassisi inference:

Even though the trial court erred in admitting the tire and expert testimony thereon, the case could properly have been decided by the jury based on the occurrence of the accident, as testified to by Wolfe. In *Cassisi*, the court recognized the difficulty facing a product liability plaintiff when, as here, the allegedly defective product is lost, and held that "there is one type of proof of product defectiveness which, from a given set of circumstances, aids a plaintiff in meeting his burden by creating a legal inference that the product was defective.... This inference arises from the occurrence of the accident itself." The court approved the holding in *Greco v. Bucciconi Engineering Co.*, 283 F.Supp. 978 (W.D.Pa.1967) *aff'd*. 407 F.2d 87 (3d Cir.1969), that "when a product malfunctions during normal operation, a legal inference of product defectiveness arises and the injured plaintiff thereby establishes a prima facie case for jury consideration."

Gencorp argues that the *Cassisi* inference does not apply to tire blowout cases, based on *Goodyear Tire and Rubber Co. v. Hughes Supply Co.*, 358 So.2d 1339 (Fla.1978), which held that the res ipsa loquitur standard is inapplicable in such cases. The *Cassisi* court recognized the *Goodyear* decision, and observed that "while the tire in *Goodyear* was not favored with the res ipsa inference it would most certainly be subject to the *Greco* inference of product defectiveness." Therefore, even though it was erroneous to admit the tire itself and the expert's testimony thereon, the *Cassisi* inference was sufficient to create a jury issue.

Cassisi does not, however, sanction a jury instruction to the effect that a legal inference of product defectiveness arises from the occurrence of malfunction during normal operation. This language is tantamount to directing a verdict in the product liability plaintiff's favor, which here was not supported

by the evidence. Because we cannot know if the jury's verdict was permissibly based on the circumstances of the accident or impermissibly founded on the erroneous instruction, the judgment in Wolfe's favor must be reversed and the case remanded for a new trial. [e.s., c.o.]

481 So. 2d at 111-12. One should carefully note precisely what it was that the court thought was improper about the instruction. It was NOT the particular text of the actual instruction proposed (presumably) by the claimant's counsel. In fact the precise text of the actual instruction does not even appear in the court's decision. Instead, the court disapproved any instruction "to the effect" of the Cassisi inference.

It is hard to see how reasonable minds could read this as anything but a holding that the Cassisi inference may not be used as the basis for a Jury Instruction. The inference is designed to apply to summary judgment and directed verdicts in favor of manufacturers where they argue that plaintiff's case should not go to the jury because of the lack of evidence of a specific defect. So far as I can see, this is the only holding on the subject of jury instructions and the Cassisi inference.

**E. Effect of Gencorp.**

Under the Florida Supreme Court's decisions, all trial

courts in this state are required to follow the decision of another District Court of Appeal on an issue when its own District Court and the Supreme Court have not ruled on it one way or the other. See Pardo v. State, 596 So. 2d 665 (Fla. 1992) ("Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts.... The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision."); Weiman v. McHaffie, 470 So.2d 682, 684 (Fla. 1985) (same); State v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976) (same).

## **II. Statutes Affecting Products Liability Presumptions**

### **A. Evidence Code**

1. § 90.302, Fla. Stat. (2001):

Every rebuttable presumption is either:

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

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All presumptions that are not conclusive are rebuttable presumptions. For several decades, courts and legal scholars have wrangled over the purpose and function of these presumptions. The view espoused by [Thayer] and [Wigmore] accepted by most courts and adopted by the American Law Institute's Model Code of Evidence, is that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact.

Professors Morgan and McCormick argue that a presumption should shift the burden of proof to the adverse party. They believe that presumptions are created for reasons of policy and argue that, if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium or if he does not believe the contrary evidence.

Under Fed. Rule Evid. 301, in civil cases all presumptions are of the "bursting bubble" type.

This Code recognizes that presumptions have been created for different purposes. While the effect of presumptions and the weight of evidence required to rebut various presumptions cannot be allowed to widely differ, the policies behind the creation of each presumption are not well served by a single uniform rule. This section, as does existing Florida law, provides an alternative and classifies rebuttable presumptions into two groups: those affecting the burden of producing evidence and those affecting the burden of proof. Whether a presumption affects the burden of producing evidence or affects the burden of proof is set forth in §§ 90.303 and 90.304.

*A presumption affecting the burden of producing evidence is a procedural device which raises the assumption that a fact exists and shifts the burden of producing evidence. When evidence is introduced by the other party, the presumption disappears and the jury will not be told of it. [e.s., c.o.]*

2. § 90.303, Fla. Stat. (2001):

In a civil action or proceeding, unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence."

3. § 90.304, Fla. Stat. (2001):

In civil actions, all rebuttable presumptions which are not defined in s. 90.303



are presumptions affecting the burden of proof.

## **B. Products Liability Statute**

§ 768.1256, Fla. Stat. (2002) Government rules defense.

(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.

(3) This section does not apply to an action brought for harm allegedly

caused by a drug that is ordered off the market or seized by the Federal Food and Drug Administration.

## **III. Analysis**

At the outset, I think the adoption of a Jury Instruction to the effect of the Cassisi inference violates Florida

Statutes. It is apparent from the text of the statute, as elucidated by the Evidence Code provision section 90.302, that the assumptions of fact as to whether the product is defective contained in section 768.1256 are "bursting bubble" provisions that disappear from the case upon the presentation of contrary evidence. See § 90.302 (Council Note: "A presumption affecting the burden of producing evidence is a procedural device which raises the assumption that a fact exists and shifts the burden of producing evidence. When evidence is introduced by the other party, the presumption disappears and the jury will not be told of it." [e.s.]); and § 768.1256(1) and (2) (presumptions as to whether product is to be considered defective expressly designated as "rebuttable").

The proposed instruction recommended by the subcommittee is to the effect of the Cassisi inference. It is manifestly a matter affecting evidence and the burden of producing evidence. Moreover, section 768.1256 directly addresses the matter of any presumptions of defect -- the only subject of the Cassisi inference -- in products liability cases. The subcommittee's proposal is constructed around an "inference," while the statute is built on a presumption. The subcommittee seems to think that the use of locution "inference" is

sufficient to work its way around the products liability statute as well as the Evidence Code and justify a formal jury instruction to the effect of the Cassisi inference because it is an "inference" and not a "presumption".

Nothing in any of the cases suggests that the Cassisi inference is intended to operate any differently than an ordinary presumption. Under section 90.303, only the Legislature can give a presumption the status of a shift in the burden of proof, and it has not done so. If this were a legal presumption it would be one affecting the burden of going forward with the evidence, not one affecting the burden of proof. I agree that no court has suggested that the Cassisi inference be given the status of a legal presumption, i.e. a legal imperative that the fact be presumed by the finder of fact until greater evidence has overcome it. Nevertheless, instructing the jury as proposed by the subcommittee has the effect of turning the inference into a shift of the burden of proof and, as the First District said in Gencorp, would amount to a directed verdict in favor of the plaintiff.

Yet in spite of the clear effect of the text of the statutes set forth above, the subcommittee proposes that the

jury be instructed that there is an "inference" of defectiveness that stays in the case even after contrary evidence to be considered along with all the evidence in the case. Without knowing what the Supreme Court might decide on the issue of adopting section 768.1256 to the extent that it is procedural, I think I can confidently say that many members of the Court are likely to be quite uncomfortable with an attempt to justify a formal jury instruction to the effect of the Cassisi inference on the grounds that it is an "inference," while section 768.1256 involves presumptions.

To be sure, I doubt that the Florida Supreme Court is likely to adopt a standard jury instruction under its sole authority to prescribe procedure that is in direct conflict with a statute on the same subject. Even if section 768.1256 might ultimately be deemed by the Supreme Court to fall under its procedural powers, it would be conclusively presumptive [pun intended] for the Committee on Standard Jury Instructions to decide that issue for itself under the guise of a Committee "determination" and take a stand contrary to the statutes.

When the Florida Evidence Code was adopted by the Legislature, and critics argued that it infringed on the Supreme Court's sole authority to adopt rules of procedure,

the Supreme Court reacted by adopting the Evidence Code to the extent that it is procedural. The Legislature has included a specific provision in this tort legislation asking that the legislation be considered as a request that it be adopted by the Court to the extent that it is procedural. No products liability case involving parties with a stake in the outcome has yet reached the Court in which the issue is presented. Why the Committee should anticipate such private litigation and present the issue to the Court is not addressed by the subcommittee, and in my opinion is a serious problem with the subcommittee's proposal. I have never understood the Committee's charter to authorize it to engage in the reform or modification of substantive law. Under the Florida Constitution, substantive law and policy is given to the Legislature, not to the judiciary or its committees.

In addition to the foregoing, I should like to offer the following thoughts.

It is true that the commentary to § 90.301 recognizes that presumptions differ from inferences:

"n Inference, "a prima facie case" and the doctrine of *res ipsa loquitur* are closely associated with the concept of a presumption, and many writers have tended to use the terms interchangeably or blur the distinctions. Presumptions differ in that when the basic fact giving rise to the presumed fact is established and there is an absence of contradictory testimony, the presumed

fact must be found to exist.

An inference is a deduction of fact that the fact-finder, in his discretion, may logically draw from another fact or group of facts that are found to exist or are otherwise established in the action.

This distinction drawn in the commentary does not in and of itself support the subcommittee's "determination" that a Cassisi instruction should be given because it is an inference rather than a presumption.

In the world of establishing facts in a trial, presumptions are stronger than inferences because a jury must indulge the presumption until contrary evidence is produced, while the inference is left up to the jury's discretion.

The terms "presumption" and "inference" are used by some courts loosely or interchangeably, although they are different in nature and may be different in effect. An inference is regarded as a permissible deduction from the evidence before the court that the jury may accept or reject, or accord such probative value as it desires, while presumption is, characteristically, a rule of law, fixed and relatively definite in its scope and effect, that attaches to certain evidentiary facts and is productive of specific procedural consequences. An inference is a deduction from facts which reason dictates, but a presumption is an arbitrary conclusion which the law directs to be made from certain facts.

Observation: The creation of a presumption has the effect of making a prima facie case without more evidence. The creation of an inference, however, merely enables the jury to draw an inference and weigh it in balance with all other evidence.

A presumption is regarded as a preliminary "rule of law" which may be made to disappear in the face of rebuttal evidence, but which, in the absence thereof, compels a decision in favor of the one who relies on it.

Nothing in the Evidence Code prevents the drawing of an inference that is appropriate.

FLA. JUR. 2D, "Evidence," § 96.<sup>1</sup> Thus if the subcommittee is

operating under a "determination" that "there is no prohibition to giving an instruction" embracing the Cassisi holding, such a "determination" cannot be justified on any basis that it is an inference we are talking about, not a presumption. An uncontradicted presumption affecting the burden of producing evidence leads to a directed verdict, not an instruction to the jury. See Nationwide Mut. Ins. Co. v. Griffin, 222 So.2d 754 (Fla. 4th DCA 1969) (if basic facts are sufficiently proven so as to give rise to presumption, and not thereafter contradicted by credible evidence, party in whose favor presumption exists becomes entitled to directed verdict).<sup>2</sup> If we do not instruct a jury as to a presumption that merely affects the burden of going forward with the evidence, why would we instruct on a mere inference?

Even more important, why instruct on the inference when it is only one of several, some of which may be to the contrary? See Cassisi, 396 So. 2d at 1151 ("Moreover, there were a number of hypothetical causes of the accident for which the defendants would not have been responsible."); see also Cassisi, 396 So. 2d at 1151-52 ("In a strict liability action, the fact that the defendant was not in control of the product when the injury occurred is obviously not a bar to the

application of the product defectiveness inference although it may be a factor for the jury to consider on the question whether the plaintiff's own conduct in fact contributed to his injuries. [e.s.]).

Why single out this particular inference for an instruction? See FLORIDA PRACTICE SERIES, § 24.8 Inference (2002) ("Other than [Florida Standard Jury Instruction (Civil) 2.1] and the instruction regarding *res ipsa loquitur*, the Standard Jury Instructions contain no other approved instructions regarding inferences."). The precedential effect of adopting the first instruction as to a non-res ipsa inference could become uncontrollable. See Lynch v. McGovern, 270 So. 2d 770, 773 (Fla. 4th DCA 1972) ("As we commonly know, the usual jury trial will often give rise to uncountable inferences that a jury may properly indulge in its fact finding function. We believe that it would be a most confusing and overwhelming undertaking to require the jury to be charged as to each and every inference that they might, or might not, indulge."). In the world of negligence and civil law, there are many inferences that can be drawn from foundation facts, but almost universally we do not single them out for the jury. Indeed it is thought at the core of the jury's function to allow it to



decide which inferences, among the many and often conflicting ones that the evidence raises, will be given weight. In spite of a tradition by this Committee of eschewing instructions calling inferences to the attention of the jury, we would now be doing precisely that.

Whether it shifts the burden or not, giving an instruction at all to the effect of the Cassisi inference also amounts to a comment on the evidence, rather than a mere explication of the applicable law. See C 90.106, Fla. Stat. (2001) ("A judge may not...comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused."). The policy of this state has been not to comment on permissible inferences because it involves the judge in highlighting the fact embraced by the inference and thus gives it undue weight because of the unique role of the judge. As one writer has explained:

[Giving an instruction] is simply not a feasible one in many jurisdictions without at least a new interpretation of another aspect of the law. The trial judge in most states must tread warily to avoid an expression of opinion on the facts. Although instructions on certain standardized inferences such as *res ipsa loquitur* are permitted, the practice, wisely or not, may frown on any explanation of the allowable circumstantial inferences from particular facts as "invading the province of the jury.

MCCORMICK ON EVIDENCE, § 344 (5th ed.) Chap. 36 The Burden of

Proof and Presumptions (John W. Strong).

One of the leading texts explains the use of Jury Instructions with regard to the inference of negligence in connection with the application of res ipsa loquitur.

Although a few jurisdictions have given the doctrine the effect of a true presumption even to the extent of using it to assign the burden of persuasion, most courts agree that it simply describes an inference of negligence. Prosser called it a "simple matter of circumstantial evidence." Most frequently, the inference called for by the doctrine is one that a court would properly have held to be reasonable even in the absence of a special rule. Where this is so, res ipsa loquitur certainly need be viewed no differently from any other inference. Moreover, even where the doctrine is artificial—where it is imposed for reasons of policy rather than logic—it nevertheless remains only an inference, permitting but not requiring, the jury to find negligence. The only difference is that where res ipsa loquitur is artificially imposed, there is better reason for informing the jury of the permissibility of the inference than there is in the case where the doctrine simply describes a rational inference. Although theoretically a jury instruction of this kind might be viewed as violating a state rule prohibiting comment on the evidence, the courts have had little difficulty with the problem and have consistently approved and required, where requested, instructions that tell the jury that a finding of negligence is permissible. Obviously these instructions can and should be given without the use of the misnomer "presumption."

MCCORMICK ON EVIDENCE, § 342 (5th ed.). Although Cassisi both compares and contrasts its inference of a manufacturing defect with the traditional doctrine of res ipsa loquitur, the subcommittee engages in mere ipse dixit in asserting that a Jury Instruction to the effect of the inference would be proper.

For one thing, the subcommittee ignores what the Supreme

Court said about res ipsa loquitur several years ago:

Res ipsa loquitur "the thing speaks for itself" is a doctrine of extremely limited applicability. It provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control. The district courts of Florida have expanded the doctrine far beyond its intended perimeters, both by liberalizing the elements requisite to its application and by allowing the development of inferences not only as to the incident itself but also as to pre-incident acts, such as manufacture or production. [e.s.]

Goodyear Tire and Rubber Co. v. Hughes Supply Co., 358 So.2d 1339, 1341-42 (Fla.1978). There is a tendency to think of res ipsa loquitur as a matter of substantive policy raising it above most inferences. See Goodyear Tire, 358 So. 2d at 1341 ("Dean Prosser has suggested that the Latin label has created confusion in the cases to which the doctrine is applied. 'Along with res gestae and other unhappy catchwords, the Latin tag should be consigned to the legal dustbin.' Lord Shaw opined that '(i)f that phrase had not been in Latin, nobody would have called it a principle.'") [c.o.]; see also McDougald v. Perry, 716 So. 2d 783, 785 (Fla. 1998) ("We continue our prior recognition that res ipsa loquitur applies only in 'rare instances.'").

The subcommittee has not explained why this products

liability inference should be deemed to have such an effect. And, of course, now that the Legislature has told us in section 768.1256 what the policy of this state shall be in regard to products liability inferences of defect, the subcommittee should make some showing as to what if any room is left for common law judges.

The subcommittee proposal makes no attempt to show why the rationale of Gencorp is mistaken. Even if I could rationalize such an instruction were there no Florida appellate decision on the subject, I would certainly not be able to do so in the face of the only appellate decision in this state holding to the contrary. The subcommittee will have to make a much more convincing case to ignore extant precedent and require a standard jury instruction in conflict with the only Florida case on the subject.

I also call the reader's attention to the materials in the Appendix.

I therefore dissent from the subcommittee's report.

## **ADDENDUM**

1.1 FLA. PRAC., Evidence C 301.1 (2002 ed.). (Prof. Charles W. Ehrhardt):

*1999 Statutory Presumptions.* As a part of a broad package of so-called tort reform legislation, in 1999 the Florida legislature enacted a number of statutory presumptions applicable in tort cases. In a product liability action, there is a rebuttable presumption that a product is not defective or unreasonably dangerous if certain government rules are complied with by the manufacturer; also created is a rebuttable presumption that a product is defective and unreasonably dangerous if the manufacturer has not complied with those rules. Additionally a statutory presumption was enacted which presumes that an employer is not negligent in hiring an employee when a specified background investigation took place and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the employment. The legislation creating these rebuttable presumptions did not specify whether they are section 90.303 bursting bubble presumptions or section 90.304 presumptions which shift the burden of proof. It is not apparent whether these statutory presumptions are established primarily to facilitate the determination of the presumed fact or to implement social policy.

Under Federal Rule of Evidence 301, all presumptions are bursting bubble presumptions or presumptions which affect the burden of producing evidence. No presumptions operate to shift the burden of proof. However, when state law supplies the rule of decision in a federal action, the effect of a presumption is determined in accordance with the law of the state that supplies the rule of decision. Rather than adopting the approach of the Federal Rules, the drafters of the Code promulgated a statutory scheme similar to that of the California Evidence Code and recognized both presumptions that affect the burden of proof and presumptions that affect the burden of producing evidence. Section 90.302(2) uses the term "burden of proof" in defining the stronger of the presumptions. This term was taken from the California Evidence Code and is intended to be applied in the sense that the burden of persuasion as to the presumed fact may be shifted.

*Inference.* A presumption differs from an inference. An inference is a logical deduction of fact that the trier of fact draws from the existence of another fact or group of facts. Whether the inferred fact is found to exist will

be decided by the trier of fact. A presumption is stronger; it compels the trier of fact to find the presumed fact if it finds certain basic facts to be present. Even if a court finds that a presumption is not present in a particular situation, an inference of the same fact can be drawn if it is supported logically by the evidence.

*Burden of Proof or Persuasion.* A party carries the burden of proof or persuasion by introducing evidence that persuades the finder of fact to find the facts the party must have to prevail. On most issues in a civil trial the burden is on the plaintiff to prove the elements of her case. The trier of fact must weigh the evidence and determine if the burden of proof has been met. [e.o., c.o., f.o.]

2.1 FEDERAL TRIAL HANDBOOK 3D CIVIL C 40:1 (Hon. Robert S. Hunter):

A presumption of fact, which is the same as—or akin to—an inference, is a logical and reasonable conclusion of the existence of a fact in a case, not presented by direct evidence as to the existence of the fact itself, but inferred from the establishment of other facts from which, by the process of logic and reason, based upon human experience, the existence of the assumed fact may be concluded by the trier of the fact. A presumption of fact, or inference, is nothing more than a probable or natural explanation of facts, is at best a mere argument, and does not estop a party from proving his case by competent evidence. A presumption of this kind arises from the commonly accepted experiences of mankind and the inferences which reasonable men would draw from experiences. In those instances where one fact is proved or ascertained and another fact is its uniform concomitant, such other fact is presumed or inferred, without other proof, because of the uniform experience concerning the connection between the two facts. Evidence of the inherent capacity and strong tendency of something to cause an event is ordinarily evidence that the event did so result therefrom.

3.21 FED. PRAC. & PROC., EVID. C 5122 (Wright & Miller Treatise) (Charles Alan Wright and Kenneth W. Graham Jr.):

In weighing the competing inferences, the judge has a good deal more leeway than when the issue is one of the credibility of a witness. It would be possible

to control the judge by statutes or appellate rulings stating what inferences are sufficient to make a case for the jury, but the general inclination of Anglo-American law has been against prescribing rules for evaluating the strength of evidence. The major exception to this tendency is the doctrine of presumptions.

At one time "presumption" was just another word for inference. In older evidence books it is common to see circumstantial evidence discussed under the heading of "presumptive evidence." This usage survives in the bail provisions of many state constitutions and in common speech. Today in the law of evidence, however, "presumption" has a special meaning: a presumption is a device by which proof of one fact—the so-called "basic fact"—must be taken for some purposes as proof of another fact—the "presumed fact."

4. Ronald J. Allen, "Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices," 94 HARV. L. REV. 321, 334-36 (1980):

But what does it mean in this context "to encourage" the jury to find fact B...once fact A...is proven, and when might a judge wish to do so? It means that the judge has indicated to the jury, with the hope of influencing it, the legislature's or his own perception of the relationship between the facts proven at trial and the existence of the presumed fact. The judge might do this when he feared that the jury might fail to perceive or appreciate the relationship, and thus would be likely to reach what the judge thinks to be an erroneous result. Consequently, the instruction would be designed to guide a decisionmaker who did not perceive the relationship towards the same understanding as one who did.

The effect of these instructions, then, is to modify the jury's inferential process by enhancing the impact of fact A. That effect is functionally indistinguishable from the effect of a judicial comment on the strength of the evidence. Like explicit comments on the evidence, these instructions modify the parties' relative burdens of persuasion, even though the formal relationship

between the state and the defendant remains the same. Given the near equivalence of explicit judicial comment and nonmandatory presumptions, then, nearly identical constitutional rules should be applicable to both.

One difference, however, between nonmandatory presumptions and traditional judicial comment on the evidence may justify slightly different treatment of the two types of instructions. Whereas explicit judicial comment attempts to inform the jury of the factors that may be relevant to its decision, and why they may be relevant, presumptive instructions merely inform the jury of a permissible outcome. Judges make little or no effort to explain to the jury why a particular result might be appropriate. Consequently, presumptive instructions may tend to promote irrational decisionmaking, even though they may also enhance the probability of a more accurate result.

An irrational inferential process is promoted by a presumptive instruction that asks the jury to engage in an impossible mental feat or tells the jury to decide whether or not to draw an inference without providing guidance for that choice. The jury is instructed to engage in an impossible mental feat when it is told to "weigh a presumption as evidence." The jury cannot "weigh the presumption" as evidence, for it is not evidence. The presumption is merely a label that has been applied to a possible relationship between facts. The intent of such an instruction should be that the jury "weigh the facts underlying the presumption and the inferences that may follow from those facts." The jury, however, is rarely informed what it should do; it is informed only that it should do what in fact it cannot do. Obviously, then, the jury's decisionmaking process is made more irrational.

Similarly, irrationality is fostered by instructions that allow but do not require an inference to be drawn. The difficulty here is that the jury may have before it "no probative evidence on which to base its own finding." Knowing only that it may, but need not, draw an inference, the jury will make a decision that "can only be arbitrary, no matter which way it finds." The problem is exacerbated by the restrictions imposed on judicial comment by many states and by the lack of satisfactory legislative history in many states that authorize these instructions by statute. Thus, a court may not be permitted to alleviate the problem; and even if it is, it may lack access to the data upon which the presumption was based. The resulting dilemma was aptly stated by one trial court:

[A]ssuming in the instant case that defendant introduced no evidence at trial, the jury would be told of the statutory presumption and that it could find the existence of the presumed fact from proof of the basic fact if it chooses to do so.... Should



the jury request clarification or illumination from the court as to how and why it should make this choice, this court would be hard-pressed to provide any.

[e.s., f.o.]

5. MCCORMICK ON EVIDENCE, § 344 (5th ed.) Chap. 36 The Burden of Proof and Presumptions (John W. Strong):

*Deviations from the theory—instructions to the jury.* ... However, far more frequently courts have justifiably held that the policies behind presumptions necessitate an instruction that in some way calls the existence of the rule to the attention of the jury despite the Thayerian proscription against the practice. The digests give abundant evidence of the widespread and unquestioning acceptance of the practice of informing the jury of the rule despite the fact that countervailing evidence has been adduced upon the disputed inference.

Given the frequency of the deviation, however, the manner in which the jury is to be informed has been a matter of considerable dispute and confusion. The baffling nature of the presumption as a tool for the art of thinking bewilders one who searches for a form of phrasing with which to present the notion to a jury. Most of the forms have been predictably bewildering. For example, judges have occasionally contented themselves with a statement in the instructions of the terms of the presumption, without more. This leaves the jury in the air, or implies too much. The jury, unless a further explanation is made, may suppose that the presumption is a conclusive one, especially if the judge uses the expression, *the law presumes.*

Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence," to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.

More attractive theoretically is the suggestion that the judge instruct the jury that the presumption is to stand accepted, unless they find that the facts upon which the presumed inference rests are met by evidence of equal weight, or in other words, unless the contrary evidence leaves their minds in equipoise, in which event they should decide against the party having the burden of persuasion upon the issue. It is hard to phrase such an instruction without conveying the impression that the presumption itself is "evidence" which must be "met" or "balanced." The overriding objection, however, is the impression

of futility that it conveys. It prescribes a difficult metaphysical task for the jury, and, in actual use, may mystify rather than help the average juror.

One possible solution, perhaps better than those already mentioned, would be for the trial judge simply to mention the basic facts of the presumption and to point out the general probability of the circumstantial inference as one of the factors to be considered by the jury. By this technique, however, a true presumption would be converted into nothing more than a permissible inference. Moreover, the solution is simply not a feasible one in many jurisdictions without at least a new interpretation of another aspect of the law. The trial judge in most states must tread warily to avoid an expression of opinion on the facts. Although instructions on certain standardized inferences such as res ipsa loquitur are permitted, the practice, wisely or not, may frown on any explanation of the allowable circumstantial inferences from particular facts as "invading the province of the jury."

Where the "bursting bubble" rule is discarded in favor of a rule which operates to fix the burden of persuasion, the problem of alerting the jury to the presumption should not exist. Under this theory, a presumption may ordinarily be given a significant effect without the necessity of mentioning the word "presumption" to the jury at all. There is no more need to tell the jury why one party or the other has the burden of persuasion where that burden is fixed by a presumption than there is where the burden is fixed on the basis of policies apparent from the pleadings. The jury may be told simply that, if it finds the existence of the basic facts, the opponent must prove the non- existence of the presumed fact by a preponderance of evidence, or, in some instances, by a greater standard. Even in those instances in which the presumption places the burden of persuasion on the same party who initially had the burden, there would seem to be no reason to mention the term. If the courts feel that the

operation of the presumption warrants a higher standard of proof, the measure of persuasion can be increased as is now done in the case of the presumption of legitimacy. However, unless we are willing to increase the measure of persuasion, nothing can be gained by informing the jury of the coincidence. The word "presumption" would only tend to confuse the issue. [e.s., f.o.]

*PL Strict Liability: Inference of Defectiveness*

**Proposal A**

**If you find from the evidence that the [describe product]**

***Alt. 1:* failed during normal or intended [use] [operation]**

***Alt. 2:* injured plaintiff during normal or intended [use]  
[operation]**

***Alt. 3:* caused damage to property in normal or intended  
[use] [operation]**

**you may as a consequence of that finding thereupon further  
decide that the [product] was defective.**

**Proposal B**

**When a product malfunctions during normal operation, the  
malfunction itself may be considered to establish that the product  
was defective.**

*Comment*

~~7. Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the Cassisi inference applies. See Cassisi v. Maytag Co., 396 So.2d 1140 (Fla. 1st DCA 1981); Gencorp, Inc. v. Wolfe, 481 So.2d 109 (Fla. 1st DCA 1985); see also Parke v. Scotty's, Inc., 584 So.2d 621 (Fla. 1st DCA 1991); Miller v. Allstate Ins. Co., 650 So.2d 671 (Fla. 3d DCA 1995).~~

7. The inference of defectiveness is based on *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981). The *Cassisi* court explained:

“There is, however, one type of proof of product defect, which, from a given set of circumstances, aids a plaintiff in meeting his burden by creating a legal inference that the product was defective

both at the time of the injury and at the time it was within the control of the supplier. This inference arises from the occurrence of the accident itself, and the case most often cited as so holding is *Greco v. Bucciconi Engineering Co.*, 283 F. Supp. 978 (W.D.Pa.1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969). We approve the *Greco* rule and apply it to the case now before us. That rule, applying Pennsylvania law, simply states that *when a product malfunctions during normal operation, a legal inference, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration.*

...

"The *Greco* inference is somewhat analogous to the *res ipsa loquitur* inference applicable to negligence cases. While, as Prosser states, '(s)trictly speaking, since proof of negligence is not an issue, *res ipsa loquitur* has no application to strict liability; ... the inferences which are the core of the doctrine remain, and are no less applicable.' Prosser, *LAW OF TORTS*, § 103 at 672-73 (4th ed. 1971). Both legal inferences are similar since they are based upon common sense assumptions that the occurrence of the accident is such that in the ordinary course of events it could not have happened as to *res ipsa*, without the negligence of the person in control, and as to the other, without the product's defective condition. Additionally, both inferences are founded upon strong policy considerations that aid a plaintiff in meeting his burden of proof when direct proof of negligence or product defectiveness is wanting." [c.o.]

396 So.2d at 1148, 1149. The inference has been recognized in subsequent Florida decisions. *Zyferman v. Taylor*, 444 So.2d 1088 (Fla. 4th DCA 1984); *Gencorp Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); *Jones v. Heil Co.*, 566 So.2d 565 (Fla. 1st DCA 1990); *Parke v. Scotty's Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *ISK Biotech Corp. v. Douberly*, 640 So.2d 85, 89 (Fla. 1st DCA 1994) ("In other words, the malfunction itself constitutes evidence of a defect."); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995); *Ainsworth v. KLI Inc.*, 967 So.2d 296 (Fla. 4th DCA 2007).

**Debra Gregory**

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**From:** skywayra tds.net [skywayra@tds.net]  
**Sent:** Tuesday, September 11, 2012 5:20 PM  
**To:** Laura Whitmore  
**Cc:** Rebecca Mercier-Vargas; Boyer, Tyrie  
**Subject:** Re: FSJIC-Products Liability Subcommittee Model charges, verdict forms, and miscellaneous sub-subcommittee

Hello all.

I agree with Laura's analysis. UI feel it would make no sense to write a revision when we have no idea why the court rejected the preliminary instruction. We should await clarification.

I agree with the change suggested for 403.14.

Regrettably I am a Judicial Roundtable presenter at the Sedona Conference (e-Discovery) meeting in Atlanta Thursday and Friday. I will be unable to attend the call.

Ralph Artigliere

On Tue, Sep 11, 2012 at 5:10 PM, Laura Whitmore <[Laura.Whitmore@arlaw.com](mailto:Laura.Whitmore@arlaw.com)> wrote:

Dear Judge Boyer, Judge Artigliere, and Rebecca,

Our subcommittee of the Products Liability subcommittee has been tasked with revising instructions 403.13 and 403.14, the model charges, and the verdict forms, consistent with the Florida Supreme Court's opinion. While our ability to accomplish the latter portion of these tasks (revising the model charges, verdict forms, and making sure all PL instructions are in the reorganized book format) probably should await the finished work of the other sub-subcommittees, we should start thinking about and discussing instructions 403.13 (Preliminary Issues) and 403.14 (Burden of Proof on Preliminary Issues). I am attaching to this email the supreme court's products liability instructions opinion for your reference because there is some question (to me at least) regarding what, specifically, our marching orders are with regard to those two instructions. As explained below, one interpretation of the Court's opinion is that we need to go back to the drawing board entirely on instruction 403.13.

#### **403.13 Preliminary Issue**

As to 403.13 (preliminary issue) the Court both "rejects" the Committee's proposed instruction (page 4) and then "refer[s]" it back to the committee "to make revisions consistent with the instructions preliminarily approved by the Court" (pages 4-5). The appendix lists this instruction as "reserved," which suggests the Court wants the Committee to keep working on it. It seems to me that if the Court wanted to entirely dispense with the instruction, it likely would have deleted the number instead of reserving a spot for it. Furthermore, and as discussed below, the Court preliminarily approved instruction 403.14- - burden of proof on the preliminary issue- - which also suggests the approval of a "preliminary issue" instruction, just not the one the Committee proposed.

It is my understanding that this is one of the issues that Judge Barton has sought clarification from the Court about in his e-mail to Clerk Hall. To date, we have not received a response.

The instruction the Committee proposed, and the Court rejected, states:

### **403.13 PRELIMINARY ISSUE**

The first issue you must decide is whether (defendant) was in a position to [correct defects in (the product) before it was sold] or [control the risk of harm that (the product) might cause after it was sold to (claimant or ultimate user)] [or] [whether (defendant), by its conduct, created the defect or assumed the responsibility that (the product might be defective)].

### **NOTES ON USE FOR 403.13**

1. This instruction is for use when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution. See *Riveria v. Baby Trend Inc.*, 914 So. 2d 1102 (Fla. 4<sup>th</sup> DCA 2005) (defendant sold product to retailer, it was marketed under defendant's name, and defendant accepted payment for the product); *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 (Fla. 1994) (strict liability applies to hotel which was actively involved in marketing of product and product was marketed from its property). If the claim is based on the defendant's status as the designer, manufacturer, importer or retailer of the product, then this instruction should not be given because the standard strict liability instructions in 403.7 and 403.15(d), cover the issues.

2. *Privity*. These instructions on products issues assume that any question of privity has been resolved in favor of the claimant. If it is necessary to submit a factual issue on privity to the jury, the committee recommends that it be submitted in the style of a preliminary charge on status or duty. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see *F.S. 672.318* and *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 & n.4 (Fla. 1988).

Because there is no explanation from the Court as to why it rejected this instruction, it is difficult to know where to begin with re-writing it. I am curious as to whether the rest of you interpret the Court's Opinion on this instruction the same way as I do. We can take a stab at re-drafting it, however, we may also want to propose to the full Committee that we seek clarification from the Court to ensure we are correctly proceeding and carrying out their direction.

I wanted to flag this issue for your attention in advance of our call this Thursday, where I understand the issue will be vetted among the entire Products Liability subcommittee. I welcome any thoughts or comments you may have in advance of that call.

### **403.14 Burden of Proof on Preliminary Issue**

According to the Opinion, proposed instruction 403.14 was "preliminarily approved," however, the Opinion also refers Section 403.14 to the Committee for appropriate revision. Yet, the appendix restates the proposed 403.14 without change. Therefore, I think the only change(s) that need to be made are to ensure it follows the format of the instructions in the subsequently-approved Reorganized Book. The approved instruction states:

### **403.14 Burden of Proof on Preliminary Issue**

If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].

If, however, the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].

Note On Use For 403.14

- The bracketed language is for use if claimant makes alternative claim(s) of liability.

**To make this instruction consistent with the other burden of proof on preliminary issue instructions in the reorganized book, I propose the following edit:**

403.14

If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].

~~If, however,~~ However, if the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].

Note On Use For 403.14

- The bracketed language is for use if claimant makes alternative claim(s) of liability.

It is important to note that there is not uniform consistency in the revised book on this proposed change. Most of the burden of proof instructions seem to begin with the word "however" and eliminate the "if, however," clause. I personally feel it is clearer to eliminate the clause, and consistent with the majority of the burden of proof instructions.

Please let me know your thoughts on 403.14, and whether you have any other questions or changes.

Thank you all!

Best regards,

**Laura K. Whitmore, Esq.  
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Ralph Artigliere  
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**Debra Gregory**

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**From:** Rebecca Mercier-Vargas  
**Sent:** Wednesday, October 03, 2012 4:59 PM  
**To:** Laura Whitmore (Laura.Whitmore@arlaw.com); Ralph Artigliere (skywayra@tds.net); twboyer@coj.net  
**Subject:** products instructions: conformance with the reorganized book and any recent amendments to instructions

**Attachments:** image001.jpg

One of the outstanding issues left for the subcommittee is to make sure that the products decisions as a whole conform to the reorganized jury instruction book and any amendments to the instructions since we submitted our products report in 2009. I think we also need to take a global look to make sure that all the instructions are consistent with any changes the Court made the proposals in our products report. I don't want to duplicate efforts, but hope you don't mind that I jotted down these notes about what we might need to revise:

403.9, negligence:

We might need to delete note on use 1 to bring the instruction in line with the other changes made by the products decision. In the products decision, the Court amended instruction 403.9 (negligence) and 403.10 (negligent failure to warn) to delete language suggesting that the plaintiff had to prove a defect for both negligence and negligent failure to warn.

In the version of 403.9 the committee submitted, the plaintiff had to prove "negligence is the failure to use reasonable care, which is the care a reasonably careful designer would use . . . which results in a product being in an unreasonably dangerous condition." The Court deleted the defect requirement, "which results in a product being in an unreasonably dangerous condition."

Similarly, in negligent failure to warn, 403.10, the court deleted the requirement that the negligence in the warning "make the product unreasonably dangerous."

As I re-read note on use 1 to instruction 403.9, it seems to assume that a plaintiff has to prove defect in the negligence claim. I think that note should come out.

403.12, notes on use 1, 2, 3, & 4: (causation instruction)

I think each of these notes mistakenly refer to instruction 403.10, when they should refer to the causation instruction, 403.12.

403.17, burden of proof on the main claim:

It looks like we will need some minor changes to make it consistent with the reorganized book (compare it with negligence instruction 401.21, burden of proof on main claim):

+++

**403.17 BURDEN OF PROOF ON MAIN CLAIM**

**If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendant)(s) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence ~~does~~ supports [one or**

more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].

[However, if the greater weight of the evidence supports (claimant's) claim against one [or] [both] [more] of the defendants], then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them].

#### NOTE ON USE FOR 403.17

Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.

++++

#### Instruction 403.18, Defense Issues:

Laura, did you look at the government rules defense issue (403.18c)? I think that it is consistent with our recommendation on 403.11 (inferences) to recommend no change to also recommend no change to the defense issue in 403.18d. Could you let me know your thoughts on that?

Also, it looks like it will need a few, minor revisions, to make 403.18 consistent with negligence instruction 401.22, defense issues:

+++

#### 403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

On the [first]\* defense, the issue[s] for you to decide [is] [are]:

*\*The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

##### *a. Comparative Negligence:*

whether (claimant or person for whose injury or death claim is made) was [himself] [herself] negligent\* in (describe alleged negligence) and, if so, whether ~~such~~ that negligence was a contributing legal cause of the injury or damage to (claimant)

**complained of.**

\*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

*b. Risk/Benefit Defense:*

**whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.**

**NOTE ON USE FOR 403.18b**

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (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). Pending 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 court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

*c. Government Rules Defense:*

No instruction provided.

**NOTE ON USE FOR 403.18c**

Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304. Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

*d. State-of-the-art Defense:*

**In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product's) manufacture, not at the time of the loss or injury.**

## NOTE ON USE FOR 403.18d

Instruction 403.7d applies only in defective design cases. *F.S. 768.1257.*

## NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). Model Charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

+++

Instruction 403.19, Burden of Proof on Defense Issues:

There are some discrepancies between this instruction and the similar instruction in the negligence context, instruction 401.23. In the first and second paragraphs of 403.19, the last couple lines ask the jury to determine the percentage of “damages” caused by the defendant or each party. Interestingly, instruction 401.23 asks the jury to apportion “negligence.” It seems that it would be more consistent in 403.19 to use “[negligence] [fault] [responsibility]” similar to 401.22f (see the errors and omissions report, because we are proposing a change to use this language consistently)

In the last note on use, Preemptive charges on defense issues, we call these “preemptive instructions” in the negligence instruction 401.22, not “preemptive charges.”

++

*Preemptive ~~charges~~ instructions on defense issues.* If a preemptive ~~charge~~ instruction for claimant ...

++

Also, in the last line of the preemptive charge note on use, I think there is a bad cross-reference that should be amended:

++

the ruling should be given immediately after framing the defense issues (instruction ~~403.17~~ 403.18).

Please just let me know what you think about these! Thanks very much,  
Rebecca

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## MEMORANDUM

**TO:** Standard Jury Instructions (Civil) Committee  
**FROM:** Rebecca Mercier Vargas  
**DATE:** January 9, 2013  
**RE:** Products Liability Subcommittee Draft Publication Notice

---

Attached is a draft of the publication notice for the products liability instructions. There are a few items that the products subcommittee would like to bring to your attention:

**Format:** We used a different format than usual because we are trying to show the changes from the language in the appendix to the Court's decision. We started with the language in the appendix to the Court's products decision and removed all of the underlining. That way, the underlined language set forth in this notice reflects a change from the instructions set forth in the appendix. We tried to explain this in the publication notice, which is wordier than normal. We included all the products instructions in the publication notice, even those we are not changing.

**403.7 Strict Liability:** As requested at the meeting, we added language to note on use 1 explaining that the revisions to the definition of manufacturing defect in 403.7(a) are not intended to change the substance of the definition found in PL 4. They are intended to be plain language changes.

Brian Baggot suggested we revise the wording of the consumer expectation test set forth in the definition of manufacturing defect, 403.7a (Brian Baggot's e-mail dated November 7, 2012 is attached). Brian raised two concerns: (1) the jury will not understand **whose** expectations regarding the safety of the intended design are determinative (the consumer's expectations or the defendant's expectations?); and (2) the consumer expectations test in the manufacturing defect instruction, 403.7a, is inconsistent with the consumer expectations test set forth in the design

defect instruction, 403.7b, which requires proof that the product was “*used as intended by the defendant or in a reasonably foreseeable manner.*”

During our October meeting, the full committee approved the following language in 403.7:

**a. Manufacturing defect**

**A product is defective—~~if—because of a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] and the product is expected to and does reaches the user or consumer without substantial change affecting that condition.~~**

**A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.**

**b. Design defect**

**A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.**



**A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [and] [or] [the risk of danger in the design outweighs the benefits].**

To address these concerns, Brian suggested two possible revisions to 403.7a. Brian's Option 1 (revising 403.7a) (adds "used as intended/reasonably foreseeable"):

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and it fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer].

Brian's Option 2 (revising 403.7a) (rewords to make clear that it is the manufacturing defect that causes the product to be unreasonably dangerous):

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and, because of that difference, fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer].

The subcommittee discussed Brian's concerns and proposals at length. The definition of the consumer expectations test in the manufacturing defect instruction comes directly from our former instruction, PL 4. Any discrepancy in language is carried over from former instructions PL 4 and PL 5.

John Kest agreed that Brian may be correct, but the direction from the committee and Court is to use the language found in former instructions PL 4 and 5. Laura Whitmore and Liz Russo stressed that we can revise the instructions to make sure that they are legally correct.

After discussion, the majority of the subcommittee decided that no revision is necessary because the full committee had decided to define defect consistent with our former instructions PL 4 and PL 5. However, we want to flag this issue for the full committee's consideration.

Tyrie Boyer raised a second issue regarding the language in 403.7(b), defining design defect. Tyrie suggested deleting the following language: “[**seller**] [**distributor**] [**supplier**] [**importer**].” This would make our proposed instruction 403.7(b) consistent with former instruction PL 5, which told the jury that the product must be “used as intended or when used in a manner reasonably foreseeable by the **manufacturer**.”

We had two conference calls discussing this issue. The Committee's 2009 report to the Court added the language “[seller] [distributor] [supplier] [importer]” throughout the instructions. The law is clear that all entities in the stream of commerce are held strictly liable. David Sales explained that, typically, the manufacturer spends more resources developing the product and knows of many more possible uses (or misuses) of the product than a company that only sells the product. Yet, both the manufacturer and the seller/retailer are held strictly liable when the product is unreasonably dangerous.

It makes sense to the subcommittee that the seller is held to the same standard as the manufacturer. Both entities should be strictly liable if the use was reasonably foreseeable by the manufacturer. We agreed with Tyrie's suggestion to delete “[seller] [**distributor**] [**supplier**] [**importer**].” from instruction 403.7(b).

**Instruction 403.15(e), Issues on the Main Claim:** As requested at the meeting, we added a note on use to refer back to the definition of design defect in 403.7(b) and note on use 3 to explain that, pending further development in the law,

the committee takes no position on whether the risk-benefit test and consumer expectations test are intended to be given alternatively or together (“[and][or]”).

After the meeting, Brian Baggot pointed out an inconsistency between the definitions of design defect in instructions 403.7(b) (definition of design defect) and 403.15(e) (issues on the main claim). In instruction 403.7(b), we define a design defect as the ordinary consumer test “[or]” the risk-benefit test. In instruction 403.15(e), the committee approved language defining a design defect as the ordinary consumer test “[and] [or]” the risk benefit test. In note on use 3 to 403.7(b), we state that pending further development in the law, the committee takes no position on whether these tests are to be given alternatively or together. We agreed with Brian’s suggestion to make these instructions consistent and use “[and] [or]” in both instructions 403.7(b) and 403.15.

**403.11. Government rules and 403.18(c) (defense issues, government rules)** In instruction 403.11, we proposed a note on use explaining we have not proposed an instruction on the government rules statute because the law is unclear on whether it creates a burden-shifting or a vanishing presumption. We added a citation to Birge v. Charron, 37 FLW S735 (Fla. 2012). This is a recent decision that has a helpful discussion regarding presumptions, even though it does not involve the government rules statute.

We also revised the note on use in instruction 403.18(c), the instruction on defense issues and the government rules defense, to keep it consistent with the note to 403.11.



**SJI Civil: Draft Publication Notice for products instructions**

**Rebecca Mercier-Vargas** to: ctjujk1, Baggot, Brian, Barton,  
James, david, Elizabeth Russo,  
farmergm, gfox, lacone, Diane,

12/14/2012 03:39 PM

[attachment "draft products publication notice 12-14-12 (00022502).DOC" deleted by Jodi B Jennings/The Florida Bar]

[attachment "image001.jpg" deleted by Jodi B Jennings/The Florida Bar]

Hello, Products Liability Subcommittee:

I hope you all are having a great holiday season so far. We had an interesting call yesterday, although only Jim Barton, David Sales and I were able to participate.

On the issue of instruction 403.7b, we all agreed with Tyrie's suggestion to delete from the definition of design defect in 403.7b the following language: "[seller] [distributor] [supplier] [importer]." This will make our proposed instruction 403.7b consistent with former instruction PL 5, which told the jury that the product must be "used as intended or when used in a manner reasonably foreseeable by the manufacturer."

The law is clear that all entities in the stream of commerce are held strictly liable. David explained that, typically, the manufacturer spends more resources developing the product and knows of many more possible uses (or misuses) of the product than someone who only sells the product. Yet, both the manufacturer and the seller/retailer are held strictly liable when the product is unreasonably dangerous. It makes sense to us that the seller is held to the same standard as the manufacturer. Both entities should be strictly liable if the use was reasonably foreseeable by the manufacturer.

I would appreciate hearing everyone's thoughts on whether you agree with this revision by the end of next week. If you are travelling for the holidays, let me know that you need a bit more time to digest this.

I have also drafted for your review the publication notice. As we discussed I added all the products instructions, even those we are not changing. We used a different format than usual. We removed all of the underlining from the instructions set forth in the Court's appendix to the products decision. All of the underlined language set forth in this notice reflects a change from the instructions set forth in the appendix. Please let me know if you think the notice explains this as clearly as possible. If you have other suggestions about how to word this, I would be happy

to hear them.

Rebecca Mercier Vargas, Esq.  
Board Certified Appellate Attorney



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**FW: SJI (civil) committee: publication notice for products liability amendments**

**Rebecca Mercier-Vargas** to: Jodi B Jennings

02/12/2013 03:21 PM

[attachment "image001.jpg" deleted by Jodi B Jennings/The Florida Bar]

From: Rebecca Mercier-Vargas

Sent: Monday, January 21, 2013 9:35 AM

To: 'Jodi B Jennings'; bartonjm@fljud13.org; jlang@carltonfields.com; jamos@fisherlawfirm.com; jbagley@jud11.flcourts.org; kbarnett@barnett442.com; pmb@FLAppellateLaw.com; ciklinc@flcourts.org; twboyer@coj.net; pdemahy@dldlawyers.com; tdukes@mmdorl.com; gfox@stfblaw.com; gfrancis@forthepeople.com; sgertz@law.fsu.edu; don@hinkleforan.com; Ingram, J.; jacobusb@flcourts.org; Kest, John ; LaRose, Edward; lewisj@1dca.org; poseyg@flcourts.org; llytal@foryourrights.com; rmccloy@hsmclaw.com; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; david@salesappeals.com; Sass, Cynthia; Suarez, Richard; Campo, Allan; farmergm@att.net; drogers@shb.com; dedeelp@msn.com; judgemattlucas@gmail.com; laura.whitmore@arlaw.com; bbaggot@rumberger.com; ctw@beggsllane.com

Subject: SJI (civil) committee: publication notice for products liability amendments

Hello, Civil Jury Instructions Committee:

The publication notice with our proposed revisions to the products instructions in response to the Supreme Court's decision is now available on the main home page of our committee website (the link is below). This notice will be published in the Feb. 1 Bar News.

If you have colleagues that practice in this area, we would appreciate it if you sent them a copy of the notice. It would also be helpful if you could forward this notice to any trial judges you know who preside over products trials. Any comments from the public are due by March 1. We will be considering any comments received at our next meeting of the full committee, on March 7-8.

[http://www.floridasupremecourt.org/civ\\_jury\\_instructions/index.shtml](http://www.floridasupremecourt.org/civ_jury_instructions/index.shtml)

Rebecca

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## Proposed Amendments to Jury Instructions in Civil Cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes new instructions for use in products liability cases, Standard Jury Instructions in Civil Cases, 403.1 through 403.19. This proposal is in response to the decision In re Standard Jury Instructions in Civil Cases Report No. 09-10 (Products Liability), 91 So.2d 3d 785 (Fla. 2012). This decision preliminarily approved several products liability instructions as set forth in appendix to the decision: 403.1 Introduction; 403.2 Summary of Claims; 403.4 Express Warranty; 403.5 Implied Warranty of Merchantability; 403.6 Implied Warranty of Fitness for Particular Purpose; 403.8 Strict Liability Failure to Warn; 403.9 Negligence; 403.10 Negligent Failure to Warn; 403.12 Legal Cause; 403.14 Burden of Proof on Preliminary Issue; 403.15 Issues on Main Claim; 403.17 Burden of Proof on Main Claim; 403.18 Defense Issues; and 403.19 Burden of Proof on Defense issues. The 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 asked the Committee to reconsider several of the instructions: 403.7 Strict Liability; 403.11 Inference of Product Defect or Negligence; 403.13 Preliminary Issue; 403.14 Burden of Proof on Preliminary Issue; and 403.16 Issues on Crashworthiness and “Enhanced Injury” Claims.

In this notice, to track the changes from the language of the instructions set forth in the Court’s appendix, the Committee began with the language in the appendix and removed all the underlining. In re Standard Jury Instructions (Products Liability), 91 So.3d at 790-812. The text that is underlined in this notice has been added to the instructions as set forth in the Court’s decision.

The appendix to the decision struck through instructions 403.7 Strict Liability and 403.16 Issues on Crashworthiness and “Enhanced Injury” Claims. In instruction 403.7, the Committee removed the strike-through text found in the appendix to the decision. In this notice, the underlining and strike-through text in instruction 403.7 show changes from the language in the Court’s appendix. In instruction 403.16, the Committee retained the strike-through text found in the appendix to the decision and drafted a new note on use, shown in underlined text.

The Court preliminarily approved instructions 403.4, 403.5 and 403.6 and the Committee made no revisions to these instructions. The underlining and strike-through text has been removed from these instructions.

Interested parties have until March 1, 2013, to submit comments electronically to the Chair of the committee, The Honorable James Manly Barton II, bartonjm@fljud13.org, with a copy to the committee liaison, Jodi Jennings, [jjennings@flabar.org](mailto:jjennings@flabar.org). After reviewing all comments, the committee may submit its proposals to the Florida Supreme Court.

## **PL**

### **PRODUCT LIABILITY**

#### **Issues**

**PL 1 — ~~Express warranty~~**

**PL 2 — ~~Implied warranty of merchantability~~**

**PL 3 — ~~Implied warranty of fitness for particular purpose~~**

**PL 4 — ~~Strict liability (manufacturing defect)~~**

**PL 5 — ~~Strict liability (design defect)~~**

**~~Burden of proof (greater weight of the evidence)~~**

#### **Defense issues**

### **403 PRODUCTS LIABILITY**

- 403.1 Introduction**
- 403.2 Summary of Claims**
- 403.3 Greater Weight of the Evidence**
- 403.4 Express Warranty**
- 403.5 Implied Warranty of Merchantability**
- 403.6 Implied Warranty of Fitness for Particular Purpose**
- 403.7 Strict Liability**
- 403.8 Strict Liability Failure to Warn**
- 403.9 Negligence**
- 403.10 Negligent Failure to Warn**
- 403.11 Inference of Product Defect or Negligence ~~(reserved)~~**
- 403.12 Legal Cause**
- 403.13 Preliminary Issue ~~(reserved)~~**
- 403.14 Burden of Proof on Preliminary Issue**
- 403.15 Issues on Main Claim**
- 403.16 Issues on Crashworthiness and “Enhanced Injury” Claims**



**403.17      Burden of Proof on Main Claim**  
**403.18      Defense Issues**  
**403.19      Burden of Proof on Defense Issues**

**PL**  
**PRODUCT LIABILITY**

**NOTE ON USE**

~~The instructions in this Part PL PRODUCT LIABILITY do not contain instructions on Negligence. When alternative issues of negligence are to be submitted, use Charge 3.5 on Negligence Issues, as in Model Charge No. 8.~~

~~The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective~~

**403.1 INTRODUCTION**

**Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.**

**NOTES ON USE FOR 403.1**

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 403.1. See Model Charge 1. Instruction 403.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 403.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences, with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. *Fla.R.Civ.P.* 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Rule* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge as the judge reads the instructions aloud.

## 403.2 SUMMARY OF CLAIMS

**The claims [defenses] in this case are as follows. (Claimant) claims that the (describe product) [designed] [manufactured] [distributed] [imported] [sold] [or] [supplied] by (defendant) was defective and that the defect in the (describe product) caused [him] [her] harm.**

**[(Claimant) [also] claims that [he] [she] sustained greater ~~or additional~~ injuries than what [he] [she] would have sustained in the (describe accident) if the (describe product) had not been defective.]**

**[(Claimant) [also] claims that (defendant) was negligent in (describe alleged negligence), which caused [him] [her] to be injured by (the product).]**

**(Defendant) denies [that] [those] claim(s) [and also claims that (claimant) was [himself] [herself] negligent in (describe the alleged comparative negligence), which caused [his] [her] harm]. [Additionally (describe any other affirmative defenses).]**

**[The parties] [(claimant)] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

### NOTE ON USE FOR 403.2

Use the second paragraph for crashworthiness claims. See instruction 403.16. Use the first bracketed phrase in the fourth paragraph when there is a claim of comparative negligence. Use the second bracketed sentence where there are additional affirmative defenses.

### **403.3       GREATER WEIGHT OF THE EVIDENCE**

**“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.**

#### **NOTES ON USE FOR 403.3**

1.    *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.
2.    *Circumstantial evidence.* The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

~~PL / express warranty~~

#### **403.4 EXPRESS WARRANTY**

**A product is defective if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction] on which (name) relied in the [purchase and] use of the product. [The representation must be one of fact, rather than opinion.]**

~~PL 2 implied warranty of merchantability~~

#### **403.5 IMPLIED WARRANTY OF MERCHANTABILITY**

**A product is defective if it is not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant).**

~~PL 3 implied warranty of fitness for particular purpose~~

#### **403.6 IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE**

**A product is defective if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which, in reliance on the judgment of (defendant), the purchaser bought the product.**



~~PL 4 strict liability (manufacturing defect)~~

~~if by reason of a manufacturing defect it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.~~

~~PL 5 strict liability (design defect)~~

~~if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].~~

~~If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).~~

~~[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)].~~

~~\*\*[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].~~

~~“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.~~

~~NOTES ON USE~~

~~If it is determined that a Negligence instruction is appropriate in addition to a Product Liability (PL) instruction, use charge 3.5 on Negligence Issues as in Model Charge No. 8.~~

~~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).~~

~~\*When the injured person is a bystander, use the language in the second pair of brackets. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997).~~

~~\*\*When defense issues are to be submitted, use the charge contained within this second pair of brackets. In other cases, use the first bracketed sentence instead.~~

## COMMENT

1. — *Privity*. These charges on product liability issues presuppose that any question of privity has been resolved in favor of the claim. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see § 672.318, Fla. Stat. (1987), and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n. 4 (Fla. 1988). Should it be necessary to submit to the jury a factual issue on privity, the committee recommends that it be submitted in the style of a preliminary charge on status or duty as in SJH 3.2.

2. — *Strict liability (Restatement of Torts 2d § 402A)*. Charge PL 4, derived from § 402A as adopted in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), is appropriate for a strict liability claim against the manufacturer based on an alleged manufacturing flaw in the product. In response to *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1052 n. 4 (Fla. 1981), directing the committee to improve its product liability charge, the committee recommends PL 5 for design defect cases, stating standards for determining when a product is “unreasonably dangerous” because of design.

PL 5 defines “unreasonably dangerous” both in terms of consumer expectations, see comment i to § 402A of the Restatement, and in terms weighing

~~the design risk against its utility. These concepts are discussed in *Radiation Tech. Inc., v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143-45 (Fla. 1st DCA 1981); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.~~

~~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).~~

~~The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. *West*, 336 So.2d at 87; but see *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, 455-56 (1978), quoted in *Cassisi*, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.~~

~~Pending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller.~~

~~3.—*Obvious defects, opportunity to inspect, disclaimers.* These concepts are not covered by the standard charges. See *Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).~~

~~4.—*Uniform Commercial Code.* There are many open questions concerning the meaning and application in Florida personal injury litigation of certain U. C. C. provisions. Compare *Schuessler v. Coca-Cola Bottling Company of Miami*, 279 So.2d 901 (Fla. 4th DCA 1973), with *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 177 (Fla. 1970). Accordingly, the committee has not undertaken to express U. C. C. concepts, as such, in these jury charges. A U. C. C. provision which is held to be applicable may be read or appropriately paraphrased for the jury. In order to avoid undue emphasis, the committee recommends that the provision read or paraphrased not be identified as a statute.~~

~~5.—*Comparative negligence.* Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar, supra* n. 2. Model charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer and model charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.~~

~~6.—The committee takes no position regarding whether the injured bystander must be foreseeable. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).~~

~~7.—Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981); *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).~~

## 403.7 STRICT LIABILITY

(Reserved)

### a. Manufacturing defect

A product is defective ~~if it is~~ because of a manufacturing defect if it is in a condition unreasonably dangerous when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] to [the user] [a person in the vicinity of the product] and the product is expected to and does reaches the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

### b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [and] [or] [the risk of danger in the design outweighs the benefits].

## NOTES ON USE FOR 403.7

1. A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). ~~In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product]”: “was not built according to its intended design [or] because the product ....” The risk/benefit test~~

does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981). Instruction 403.7(a) retains the definition of manufacturing defect found in former instruction PL 4. The minor changes from the definition found in PL 4 are intended to make this instruction more understandable to jurors without changing its meaning.

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *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). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: *Products Liability* to define a product defect. See *Union Carbide Corp. v. Aubin*, 97 So.3d 886 (Fla. 3d DCA 2012); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc.*, 48 So.3d 976 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the ordinary consumer test. See *Agrofollajes*, 48 So.3d at 997. Pending 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 risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.

4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. ~~Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, \_\_\_ So.2d \_\_\_, 33 FLW S963 (Fla. 2008). See also *Force* at 107. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*. The decision in *Force* did not directly address the correctness of these instructions. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue.~~

5. When strict liability and negligence claims are tried together, to clarify differences between them 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

6. See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution.

## 403.8 STRICT LIABILITY FAILURE TO WARN

**A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.**

### NOTES ON USE FOR 403.8

1. The following cases recognize strict liability for a failure to warn of defects. *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).



## 403.9 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances.

### NOTES ON USE FOR 403.9

~~1.~~—An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product, or from an unsafe design choice for the product. See, e.g., *Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307 (Fla. 3d DCA 1967). A product can also be unreasonably dangerous because it was adulterated, such as with foreign materials in foodstuffs or pharmaceuticals. See, e.g., *Food Fair Stores of Florida, Inc. v. Macurda*, 93 So.2d 860 (Fla. 1957); *E.R. Squibb & Sons Inc. v. Stickney*, 274 So.2d 898 (Fla. 1st DCA 1973).

~~2.~~ If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, e.g., *Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2d DCA 1967).

~~2. 3.~~ In order to clarify the differences between strict liability and negligence when the two claims are tried together, 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

## 403.10 NEGLIGENCE FAILURE TO WARN

**[Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances.] Reasonable care on the part of (defendant) requires that (defendant) give appropriate warning(s) about particular risks of (the product) which (defendant) knew or should have known are involved in the reasonably foreseeable use(s) of the product.**

### NOTE ON USE FOR 403.10

The cases recognize a claim for negligent failure to warn. *Ferayorni v. Hyundai*, 711 So.2d 1167 (Fla. 4th DCA 1998). When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

## 403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE

~~(Reserved)~~

### NOTES ON USE FOR 403.11

1. F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304; *University Insurance Co. of North America v. Warfel*, 82 So.3d 47 (Fla. 2012); *Birge v. Charron*, 37 FLW S735 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Insurance Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

## 403.12 LEGAL CAUSE

*a. Legal cause generally:*

**[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.**

*b. Concurring cause:*

**In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].**

*c. Intervening cause:*

*\*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:*

**\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].**

NOTES ON USE FOR 403.12

1. Instruction 403.~~40a~~12a (legal cause generally) is to be given in all cases. Instruction 403.~~40b~~12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.~~40e~~12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 403.~~40a~~12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 403.~~40b~~12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 403.~~40e~~12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozzer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So.2d 520 (Fla. 1980).

5. “*Probable*” results. The committee recommends that the jury not be charged that the damage must be such as would have appeared “probable” to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term “reasonably foreseeable” is used in place of “probable.” The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.

6. The term “substantially” is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be

regarded as a legal cause. “Substantially” was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant’s negligence, *Loftin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff’s contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

## 403.13 PRELIMINARY ISSUE

**(Reserved)**

**The first issue you must decide is whether (defendant) was in a position to [correct defects in (the product) before it was sold] [or] [control the risk of harm that (the product) might cause after it was sold to (claimant or ultimate user)] [or] [whether (defendant), by its conduct, created the defect or assumed the responsibility that (the product) might be defective].**

### NOTES ON USE FOR 403.13

1. This instruction is for use when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution. See *Rivera v. Baby Trend, Inc.*, 914 So.2d 1102 (Fla. 4th DCA 2005) (defendant sold product to retailer, it was marketed under defendant's name, and defendant accepted payment for product); *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla. 1994) (strict liability applies to hotel which was actively involved in marketing of product and product was marketed from its property). If the claim is based on the defendant's status as the designer, manufacturer, importer, or retailer of the product, then this instruction should not be given because the standard strict liability instructions, 403.7 and 403.15(d), cover the issues.

2. *Privity*. These instructions on products liability issues assume that any question of privity has been resolved in favor of the claimant. If it is necessary to submit a factual issue on privity to the jury, the committee recommends that it be submitted in the style of a preliminary charge on status or duty. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see *F.S.* 672.318 and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n.4 (Fla. 1988).

#### **403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE**

**If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].**

**~~If, however,~~ However, if the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].**

#### **NOTE ON USE FOR 403.14**

The bracketed language is for use if claimant makes alternative claim(s) of liability.



### 403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) claim against (defendant) are:

*a. Express Warranty:*

**whether** (the product) **failed to conform to representations of fact made by** (defendant), **orally or in writing, in connection with the [sale] [transaction], on which** (name) **relied in the [purchase and] use of the product, and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*b. Implied Warrant of Merchantability:*

**whether** (the product) **was not reasonably fit for either the uses intended or the uses reasonably foreseeable by** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*c. Implied Warranty of Fitness for Particular Purpose:*

**whether** (the product) **was not reasonably fit for the specific purpose for which** (defendant) **knowingly sold** (the product) **and for which** (claimant) **bought** (the product) **in reliance on the judgment of** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*d. Strict Liability — Manufacturing Defect:*

**whether** (the product) **[was ~~not built according to~~ made differently than its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer]** and (the product) **reached** (claimant) **without substantial change affecting the condition in which it was sold** and, if so, **whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*e. Strict Liability — Design Defect:*

whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant) without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).

*f.e. Strict Liability — Failure to Warn:*

**whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*g.f. Negligence:*

**whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*h.g. Negligent Failure to Warn:*

**whether (defendant) negligently failed to warn about particular risks involved in the use of (the product), and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

#### NOTE ON USE FOR 403.15

Instruction 403.15(e) retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. See Instruction 403.7(b) and Note on Use 3. Pending further development in the law, the committee takes no position on whether the consumer expectations and risk/benefit tests should be given alternatively or together.

403.16            **ISSUES ON CRASHWORTHINESS AND “ENHANCED  
INJURY” CLAIMS  
(RESERVED)**

~~[In addition, there is a second set of issues you must also decide in this case.]\*  
(Claimant) [next] claims [he] [she] suffered [greater] [or] [additional] injuries in  
the accident than [he] [she] would have otherwise suffered if (describe the alleged  
crashworthiness defect) had not been defective. (Claimant) does not claim that  
(describe the alleged crashworthiness defect) caused the accident.\*\*~~

~~\*Use the bracketed language when there are other defect claims in the case.~~

~~\*\*The defendant is entitled to have the jury instructed on this last sentence  
“when appropriate.” D’Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001).~~

~~The issues you must decide on this claim are whether (describe the alleged  
defective part of the product) was defective and, if so, whether that defect was a  
legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for  
whose injury claim is made) that was [greater than] [or] [additional to that which]  
[he] [she] would have suffered if (describe the alleged defective part of the  
product) had not been defective.~~

~~A product is defective if it is unreasonably dangerous when it leaves the  
possession of the [manufacturer] [seller] [distributor] [supplier] [importer]  
[defendant] and the product reaches the user or consumer without substantial  
change affecting that condition.~~

~~A product is unreasonably dangerous to [the user] [a person in the vicinity of  
the product]\* if [the product fails to perform as safely as an ordinary consumer  
would expect when used as intended or when used in a manner reasonably  
foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]].~~

~~\*When the injured person is a bystander, use the language in the second set of  
brackets. See West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976), and  
Sanchez v. Hussey Seating Co., 698 So.2d 1326 (Fla. 1st DCA 1997). See 403.7  
note 2.~~

~~Normally a defendant is responsible for only [loss] [injury] [or] [damage]  
caused by its product and not the actions of others. If you find that the (describe the  
alleged defective part of the product) was defective and that defect caused [loss]~~

~~[injury] [or] [damage] to (claimant) that was [greater than] [or] [additional to that which] would have resulted from the accident if (describe the alleged defective part of the product) had not been defective, you should try to separate the damages caused by (describe the alleged defective part of the product), determine what part of (claimant's) [loss] [injury] [or] [damage] resulted from (describe the alleged defective part of the product), and the actions of others and award (claimant) money only for those damages caused by (describe the alleged defective part of the product). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).~~

### NOTES ON USE FOR 403.16

1. ~~The term “enhanced injury” is not used in this instruction. Although cases use that term, the committee believes that “enhance” has a connotation not appropriate for describing traumatic injuries. More appropriate terms might be “aggravated,” “increased injury,” or “separate injury.” For that reason, the committee has used quotation marks for the term “enhanced injury” in the title to this instruction. Although many of these claims involve motor vehicles, there is no reason the same principle would not apply to any “enhanced injury” claim regardless of the product involved.~~

2. ~~Use this instruction for “crashworthiness” claims instead of instruction 403.15. But instruction 403.15 should be used together with this instruction when there is also a defect claim that does not involve a claim of an “enhanced injury.” In cases in which there is a claim that one defect caused the accident but a different defect caused an “enhanced injury,” it may be necessary to identify the separate defects.~~

3. ~~It is not necessary to repeat the definition of defectiveness in paragraph 2 of this instruction if it has already been given as part of earlier instructions.~~

4. ~~This instruction retains the risk/benefit test for product defect, which previously appeared in PL 5. As noted in Note 3 to instruction 403.7, pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard of product defect or an affirmative defense. See 403.7, 403.18. The risk/benefit test is provided in both instructions to illustrate how it is used in either case. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.~~

In 2011, the legislature amended F.S. 768.81 to state that in a products liability case where the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the legislature intended this amendment to overrule the decision in *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001). See Ch. 2011-215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

### **403.17 BURDEN OF PROOF ON MAIN CLAIM**

**If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendants) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence ~~does~~ supports [one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence supports (claimant's) claim against one or [both] [more] of the defendants], then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them].**

#### **NOTE ON USE FOR 403.17**

Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.

## 403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

**On the [first]\* defense, the issue[s] for you to decide [is] [are]:**

*\*The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

a. *Comparative Negligence:*

**whether (claimant or person for whose injury or death claim is made) was [himself] [herself] negligent \*in (describe alleged negligence) and, if so, whether ~~sue~~that negligence was a contributing legal cause of the injury or damage complained of to (claimant).**

\*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

b. *Risk/Benefit Defense:*

**whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.**

### NOTE ON USE FOR 403.18b

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (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). Pending 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 court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

c. *Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

~~Florida Statutes section~~ F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S. 90.301–90.304*; *Universal Insurance Co. of North America v. Warfel*, 82 So.3d 47 (Fla. 2012); *Birge v. Charron*, 37 FLW S735 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

*d. State-of-the-art Defense:*

**In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product's) manufacture, not at the time of the loss or injury.**

NOTE ON USE FOR 403.18d

Instruction 403.7d applies only in defective design cases. *F.S. 768.1257*.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). Model Instruction 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Instruction 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).



### 403.19 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 supports (claimant's) [claim] [one or more of (claimant's) claims], 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 damages [negligence] [fault] of [both] [all] defendants was caused by each defendant.]**

*\*Use the second bracketed language 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] [and] [(identify additional person(s) or entit(y)(ies))] were [negligent] [at fault] and that the [negligence] [fault] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form ~~the total amount of the damages and what percentage of the total damages is chargeable to each party~~ what percentage of the total [negligence] [fault] 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] [at fault] and that the [negligence] [fault] 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] [fault] of [both] [all] parties to this action [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.]**

*Use the following paragraph in cases without a comparative negligence defense but with an apportionment of 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] [at fault] and that the [negligence] [fault] 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] [fault] of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.**

NOTE ON USE FOR 403.19

*Preemptive ~~charges~~ instructions on defense issues.* If a preemptive ~~charge~~ 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, a ~~charge~~ instruction in the form of instruction 401.13 should be given immediately following instruction 403.15. If a preemptive ~~charge~~ 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 ~~charge~~ instruction announcing the ruling should be given immediately after framing the defense issues (instruction 403.1718).

## **M E M O R A N D U M**

**TO:** Standard Jury Instructions (Civil) Committee  
**FROM:** Rebecca Mercier Vargas  
**DATE:** March 6, 2013  
**RE:** Products Liability: Public Comments

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We published our proposed products instructions for public comment in the February 1 issue of the Florida Bar News (pages 47-82 of the meeting materials). The deadline for public comment was March 1, 2013. On March 4, the following members met by phone to discuss the comments received: Brian Baggott, Phil Burlington, Jim Barton, Tyrie Boyer, Liz Russo, David Sales, Laura Whitmore and me.

We received four comments on the products instructions:

1. Don Fountain and Julie H. Littky-Rubin, Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin (2/21/13, meeting materials pages 83-88).
2. Todd Stewart, Law Offices of Todd S. Stewart (2/24/13, e-mailed to committee)
3. Wendy F. Lumish with Carlton Fields and Richard (“Dick”) Caldwell with Rumberger, Kirk & Caldwell (2/28/13, e-mailed to committee)
4. Theodore J. Leopold and Leslie M. Kroeger with Leopold Law (3/1/13, e-mailed to committee).

### **COMMENTS FROM PLAINTIFF’S ATTORNEYS**

Three of these comments, written by Mr. Fountain, Ms. Littky-Rubin, Mr. Stewart, Mr. Leopold and Ms. Kroeger, raised four substantially similar issues. Each of these attorneys practices at a firm in Palm Beach County that primarily represents plaintiffs in personal injury cases. This memo refers to these attorneys collectively as “plaintiff’s counsel.”

**Post-sale duty to warn:** Each of the plaintiff's attorneys who commented believes that the instruction on Negligent Failure to Warn, 403.10, should be revised to make clear that the defendant has a post-sale duty to warn. In other words, the duty to warn includes dangers that become known to the defendant after the sale. The attorneys cited Sta-Rite Indus., Inc. v. Levey, 909 So. 2d 901, 905 (Fla. 3d DCA 2004) (holding a jury question existed on the 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 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, David Sales circulated to the subcommittee the decision in 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 subcommittee agreed that under Sta-Rite and High, defendants have a duty to warn of dangers that become known after the sale of the product.

However, the consensus of the subcommittee was that instruction 403.10 is legally correct. As written, the instruction does not foreclose a jury from considering evidence of negligence that occurred after the sale. The Supreme Court has already preliminarily approved instruction 403.10.

David Sales disagreed and felt that jurors will not understand from instruction 403.10 that they can consider evidence of things that happened after the sale as evidence that the defendant failed to warn. At a minimum, Sales recommends a note on use making this clear.

**The subcommittee decided to defer action on this comment until after the report is submitted to the Court in April.**

**Preliminary issue instruction 403.13 and 403.14:** The plaintiff's attorneys also commented that the instructions on Preliminary Issue, 403.13, and Burden of Proof on Preliminary Issue, 403.14, are legally incorrect. They are concerned 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.

During the October meeting, the committee discussed the fact that we were unsure of the direction the Court intended the committee to take on these

instructions. The Court rejected instruction 403.13, Preliminary Issue, which sets forth the preliminary issue to be given where the defendant did not have physical possession of the product. The appendix states that instruction 403.13 is “reserved.”

Instruction 403.14 provides the burden of proof for preliminary issues. The decision is inconsistent and states both that 403.14 is “preliminarily approve[d]” (page 4) and referred back for further work (page 5). We sought clarification on this issue from the Clerk of the Court, but have not received a response.

The subcommittee agrees with the concern expressed in these comments. It is well-settled that strict liability extends to the all defendants in the chain of distribution. The subcommittee is concerned that instruction 403.13 might be misinterpreted as requiring defendants to be in a position to correct the defect. Although the notes state that the committee intended 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 subcommittee recommends that we state in the report that we are continuing to consider these comments. Rather than resubmitting the same instruction that we submitted previously, we will state “reserved” under instruction 403.13. This mirrors the approach of the Supreme Court in its appendix to the products decision.**

**State of the Art Defense 403.18d:** The plaintiff’s attorneys believe that instruction on the State-of-the-art Defense, 403.18d, should not be included in instruction 403.18 as a Defense Issue. This instruction uses the language found in section 768.1257, Florida Statutes, which uses the term “defense.” However, the plaintiff’s attorneys point out that this statute really deals with an evidentiary issue. If a defendant prevails on a **defense** listed in 403.18, then instruction 403.19 tells the jury to enter **judgment** for the defendant. The plaintiff’s 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 subcommittee agrees with the comment that section 768.1257 does not create a complete defense. As suggested in the comments, this instruction does deal with an evidentiary issue.

Phil Burlington noted that this instruction illustrates why the instruction on post-sale duty to warn is needed. If the jury is given the instruction on the state-of-the-art defense, it will assume that it cannot consider evidence of things that happened after the sale to support a warnings claim. Rebecca Vargas responded that the tension between these cases the statute creating the state-of-the-art defense may need to be resolved through case law.

The subcommittee feels that instruction 403.18d accurately paraphrases section 768.1257. In the opinion of the subcommittee, 403.18d will not be misunderstood by jurors as creating a complete defense. This instruction was already preliminarily approved by the Florida Supreme Court. **The subcommittee recommends against changing the instruction on the state-of-the-art defense, 403.18d.**

**Use of the term “fault” in instruction 403.19:** In instruction 403.19, Burden of Proof on Defense Issues, the jury is instructed to determine the “percentage of the total [negligence] [fault]” of the defendants and write it on the verdict form. The plaintiff’s attorneys state that using the term “fault” is not accurate in a strict liability case, where 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. The committee had settled on 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. Even though “fault” is not technically accurate in a strict liability case, the subcommittee feels that this is a term that jurors will understand. Instruction 403.19 is given with other instructions that explain what the plaintiff has to prove to prevail in a strict liability case. **The subcommittee recommends against making any changes in response to this comment, over the dissent of Phil Burlington.**

#### **COMMENTS FROM DEFENSE COUNSEL:**

The subcommittee also considered the comments of two distinguished former members of our committee, Ms. Lumish and Mr. Caldwell. Both were very active members of the products subcommittee and presented oral argument on these instructions in the Florida Supreme Court. Because Ms. Lumish and Mr. Caldwell primarily represent defendants, this memo refers to them collectively as “defense counsel.”

**Instruction 403.7, Note 1:** This comment suggests deleting 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 the citations to 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). Defense counsel point out that jury instructions are not concerned with the sufficiency of the pleadings and proof, which is the subject of motions for directed verdict. They also question whether the note overstates the holdings of the cited cases.

The subcommittee agreed that this sentence had been necessary when the committee combined the instructions for design and manufacturing defects in instruction 403.7. It is no longer necessary because the instructions for design and manufacturing defects have been separated. Tyrie Boyer stated that the language in the note could still give helpful guidance to the trial judge. Despite this, the subcommittee recommends going back to the language similar to the notes in the PL instructions, which did not include this sentence. **The subcommittee recommends adopting this change and deleting the first sentence of note on use 1 to instruction 403.7.**

#### **Instruction 403.7, Note 5 (Inconsistent verdicts & two-issue rule):**

Defense counsel asks the committee to delete note 5 to instruction 403.7. 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. Defense counsel argue that many Florida courts have held that if a jury finds the product is not defective due to its design, then the manufacturer cannot be negligent in designing the product. On page 6 of their memo, defense counsel asks to add this instruction:

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.

Alternatively, defense counsel suggest adding the notes on use found in the former PL instructions that warned of potential problems with inconsistent verdicts and the two-issue rule:

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).

\* \* \*

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).

The committee discussed the fact that one of the changes the Supreme Court made to our proposed instructions was to delete language suggesting that a plaintiff has to prove in a negligence action that the product was defective. As originally submitted by the committee, the negligence 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 the instruction on negligent failure to warn, 403.9, and deleted language that negligence in failing to give appropriate warnings "**make[s] the product unreasonably dangerous.**"

Liz Russo pointed out that the problem of inconsistent verdicts can also be dealt with in the verdict forms. The subcommittee is deferring its work on the model charges and verdict forms until after it submits the proposed products instructions to the Court.

Tyrie Boyer observed that there is no harm in alerting the public to a potential problem with inconsistent verdicts with the note on use. Barton pointed out that the proposed language in the note was found in the former PL instructions and remains a correct statement of the law.

**In light of the Court's revisions, the subcommittee recommends against inserting the new instruction suggested by defense counsel stating that the plaintiff must prove in a negligence case that the product is defective. However, the subcommittee recommends restoring the notes on use found in the former PL instructions that warned of possible problems with inconsistent**



**verdicts and the two-issue rule. We added the language about the two-issue rule to note 3 and the language on inconsistent verdicts to note 5.**

**Strict Liability Failure to Warn, 403.8, note 1:** Defense counsel suggested adding a citation to the decision in Union Carbide Corp. v. Aubin, 97 So. 3d 886, 898 (Fla. 3d DCA 2012). **The subcommittee agreed with this suggestion and added a citation to Union Carbide to note 1 of instruction 403.8.**

**EDITORIAL CHANGES** (suggested by subcommittee members)

**403.7:** Changed typeface of the title to bold

**403.18:** Corrected a typo in the note on use to instruction 403.18d that mistakenly referred to “403.7d” instead of “403.18d.” (Changed “Instruction 403.7d applies only in ...” to “Instruction 403.**18**d applies only in...”).

**REVISIONS TO PRODUCTS INSTRUCTIONS**  
**PUBLISHED IN BAR NEWS 2/1/13**  
**IN RESPONSE TO COMMENTS FROM PUBLIC**

**~~PL~~**

**~~PRODUCT LIABILITY~~**

**Issues**

**~~PL 1 — Express warranty~~**

**~~PL 2 — Implied warranty of merchantability~~**

**~~PL 3 — Implied warranty of fitness for particular purpose~~**

**~~PL 4 — Strict liability (manufacturing defect)~~**

**~~PL 5 — Strict liability (design defect)~~**

**~~Burden of proof (greater weight of the evidence)~~**

**~~Defense issues~~**

**403 PRODUCTS LIABILITY**

- |              |   |
|--------------|---|
| <b>403.1</b> | <b>Introduction</b>                                       |
| <b>403.2</b> | <b>Summary of Claims</b>                                  |
| <b>403.3</b> | <b>Greater Weight of the Evidence</b>                     |
| <b>403.4</b> | <b>Express Warranty</b>                                   |
| <b>403.5</b> | <b>Implied Warranty of Merchantability</b>                |
| <b>403.6</b> | <b>Implied Warranty of Fitness for Particular Purpose</b> |
| <b>403.7</b> | <b>Strict Liability</b>                                   |
| <b>403.8</b> | <b>Strict Liability Failure to Warn</b>                   |
| <b>403.9</b> | <b>Negligence</b>   |

<b>403.10</b>	<b>Negligent Failure to Warn</b>
<b>403.11</b>	<b>Inference of Product Defect or Negligence <del>(reserved)</del></b>
<b>403.12</b>	<b>Legal Cause</b>
<b>403.13</b>	<b>Preliminary Issue <del>(reserved)</del></b>
<b>403.14</b>	<b>Burden of Proof on Preliminary Issue</b>
<b>403.15</b>	<b>Issues on Main Claim</b>
<b>403.16</b>	<b>Issues on Crashworthiness and “Enhanced Injury” Claims</b>
<b>403.17</b>	<b>Burden of Proof on Main Claim</b>
<b>403.18</b>	<b>Defense Issues</b>
<b>403.19</b>	<b>Burden of Proof on Defense Issues</b>

**PL**  
**PRODUCT LIABILITY**

**NOTE ON USE**

~~The instructions in this Part PL PRODUCT LIABILITY do not contain instructions on Negligence. When alternative issues of negligence are to be submitted, use Charge 3.5 on Negligence Issues, as in Model Charge No. 8.~~

~~The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective~~

**403.1 INTRODUCTION**

**Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.**

**NOTES ON USE FOR 403.1**

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 403.1. See Model Charge 1. Instruction 403.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 403.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences, with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. *Fla.R.Civ.P.* 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Rule* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge as the judge reads the instructions aloud.

## 403.2 SUMMARY OF CLAIMS

**The claims [defenses] in this case are as follows. (Claimant) claims that the (describe product) [designed] [manufactured] [distributed] [imported] [sold] [or] [supplied] by (defendant) was defective and that the defect in the (describe product) caused [him] [her] harm.**

**[(Claimant) [also] claims that [he] [she] sustained greater ~~or additional~~ injuries than what [he] [she] would have sustained in the (describe accident) if the (describe product) had not been defective.]**

**[(Claimant) [also] claims that (defendant) was negligent in (describe alleged negligence), which caused [him] [her] to be injured by (the product).]**

**(Defendant) denies [that] [those] claim(s) [and also claims that (claimant) was [himself] [herself] negligent in (describe the alleged comparative negligence), which caused [his] [her] harm]. [Additionally (describe any other affirmative defenses).]**

**[The parties] [(claimant)] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

### NOTE ON USE FOR 403.2

Use the second paragraph for crashworthiness claims. See instruction 403.16. Use the first bracketed phrase in the fourth paragraph when there is a claim of comparative negligence. Use the second bracketed sentence where there are additional affirmative defenses.

### **403.3      GREATER WEIGHT OF THE EVIDENCE**

**“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.**

#### **NOTES ON USE FOR 403.3**

1.    *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.
2.    *Circumstantial evidence.* The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

~~PL-1 express warranty~~

#### **403.4 EXPRESS WARRANTY**

**A product is defective if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction] on which (name) relied in the [purchase and] use of the product. [The representation must be one of fact, rather than opinion.]**



~~PL 2 implied warranty of merchantability~~

#### **403.5 IMPLIED WARRANTY OF MERCHANTABILITY**

**A product is defective if it is not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant).**

~~PL 3 implied warranty of fitness for particular purpose~~

**403.6 IMPLIED WARRANTY OF FITNESS FOR  
PARTICULAR PURPOSE**

**A product is defective if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which, in reliance on the judgment of (defendant), the purchaser bought the product.**

*PL 4 strict liability (manufacturing defect)*

~~if by reason of a manufacturing defect it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.~~

*PL 5 strict liability (design defect)*

~~if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]\* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].~~

~~If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).~~

~~[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)].~~  
~~\*\*[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].~~

~~“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.~~

NOTES ON USE

~~If it is determined that a Negligence instruction is appropriate in addition to a Product Liability (PL) instruction, use charge 3.5 on Negligence Issues as in Model Charge No. 8.~~

~~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).~~

~~\*When the injured person is a bystander, use the language in the second pair of brackets. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997).~~

~~\*\*When defense issues are to be submitted, use the charge contained within this second pair of brackets. In other cases, use the first bracketed sentence instead.~~

## COMMENT

~~1.—*Privity*. These charges on product liability issues presuppose that any question of privity has been resolved in favor of the claim. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see § 672.318, Fla. Stat. (1987), and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n. 4 (Fla. 1988). Should it be necessary to submit to the jury a factual issue on privity, the committee recommends that it be submitted in the style of a preliminary charge on status or duty as in SJ1 3.2.~~

~~2.—*Strict liability* (*Restatement of Torts 2d* § 402A). Charge PL 4, derived from § 402A as adopted in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), is appropriate for a strict liability claim against the manufacturer based on an alleged manufacturing flaw in the product. In response to *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1052 n. 4 (Fla. 1981), directing the committee to improve its product liability charge, the committee recommends PL 5 for design defect cases, stating standards for determining when a product is “unreasonably dangerous” because of design.~~

~~PL 5 defines “unreasonably dangerous” both in terms of consumer expectations, see comment i to § 402A of the Restatement, and in terms weighing~~

~~the design risk against its utility. These concepts are discussed in *Radiation Tech. Inc., v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143-45 (Fla. 1st DCA 1981); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.~~

~~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).~~

~~The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. *West*, 336 So.2d at 87; but see *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, 455-56 (1978), quoted in *Cassisi*, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.~~

~~Pending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller.~~

~~3.—*Obvious defects, opportunity to inspect, disclaimers.* These concepts are not covered by the standard charges. See *Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).~~

~~4.—*Uniform Commercial Code.* There are many open questions concerning the meaning and application in Florida personal injury litigation of certain U. C. C. provisions. Compare *Schuessler v. Coca-Cola Bottling Company of Miami*, 279 So.2d 901 (Fla. 4th DCA 1973), with *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 177 (Fla. 1970). Accordingly, the committee has not undertaken to express U. C. C. concepts, as such, in these jury charges. A U. C. C. provision which is held to be applicable may be read or appropriately paraphrased for the jury. In order to avoid undue emphasis, the committee recommends that the provision read or paraphrased not be identified as a statute.~~

~~5.—Comparative negligence. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar*, *supra* n. 2. Model charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer and model charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.~~

~~6.—The committee takes no position regarding whether the injured bystander must be foreseeable. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).~~

~~7.—Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981); *Geneorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).~~

## 403.7 STRICT LIABILITY

(Reserved)

### a. Manufacturing defect

~~A product is defective if it is~~ because of a manufacturing defect if it is in a condition unreasonably dangerous when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] to [the user] [a person in the vicinity of the product] and the product is expected to and does reaches the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

### b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [and] [or] [the risk of danger in the design outweighs the benefits].

## NOTES ON USE FOR 403.7

1. ~~A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product]”: “was not built according to its intended design [or] because the product ....” The risk/benefit test~~

does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981). Instruction 403.7(a) retains the definition of manufacturing defect found in former instruction PL 4. The minor changes from the definition found in PL 4 are intended to make this instruction more understandable to jurors without changing its meaning.

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *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). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: Products Liability to define a product defect. See *Union Carbide Corp. v. Aubin*, 97 So.3d 886 (Fla. 3d DCA 2012); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co., Inc.*, 48 So.3d 976 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the ordinary consumer test. See *Agrofollajes*, 48 So.3d at 997. Pending 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 risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together. 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).



4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. ~~Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, \_\_\_ So.2d \_\_\_, 33 FLW S963 (Fla. 2008). See also *Force* at 107. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*. The decision in *Force* did not directly address the correctness of these instructions. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue.~~

5. When strict liability and negligence claims are tried together, to clarify differences between them 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). 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).

6. See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution.

## 403.8 STRICT LIABILITY FAILURE TO WARN

**A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.**

### NOTES ON USE FOR 403.8

1. The following cases recognize strict liability for a failure to warn of defects. Union Carbide Corp. v. Aubin, 97 So.3d 886, 898 (Fla. 3d DCA 2012); McConnell v. Union Carbide Corp., 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); Union Carbide Corp. v. Kavanaugh, 879 So.2d 42, 45 (Fla. 4th DCA 2004); Scheman-Gonzalez v. Saber Manufacturing Co., 816 So.2d 1133 (Fla. 4th DCA 2002); Ferayorni v. Hyundai Motor Co., 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

## 403.9 NEGLIGENCE

**Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances.**

### NOTES ON USE FOR 403.9

~~1.—An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product, or from an unsafe design choice for the product. See, e.g., *Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307 (Fla. 3d DCA 1967). A product can also be unreasonably dangerous because it was adulterated, such as with foreign materials in foodstuffs or pharmaceuticals. See, e.g., *Food Fair Stores of Florida, Inc. v. Macurda*, 93 So.2d 860 (Fla. 1957); *E.R. Squibb & Sons Inc. v. Stiekney*, 274 So.2d 898 (Fla. 1st DCA 1973).~~

~~2.~~ If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, e.g., *Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2d DCA 1967).

~~2.~~ ~~3.~~ In order to clarify the differences between strict liability and negligence when the two claims are tried together, 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

#### 403.10 NEGLIGENCE FAILURE TO WARN

**[Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances.] Reasonable care on the part of (defendant) requires that (defendant) give appropriate warning(s) about particular risks of (the product) which (defendant) knew or should have known are involved in the reasonably foreseeable use(s) of the product.**

#### NOTE ON USE FOR 403.10

The cases recognize a claim for negligent failure to warn. *Ferayorni v. Hyundai*, 711 So.2d 1167 (Fla. 4th DCA 1998). When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction 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. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

## 403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE

(Reserved)

### NOTES ON USE FOR 403.11

1. F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304; *University Insurance Co. of North America v. Warfel*, 82 So.3d 47 (Fla. 2012); *Birge v. Charron*, 37 FLW S735 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Insurance Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

## 403.12 LEGAL CAUSE

*a. Legal cause generally:*

**[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.**

*b. Concurring cause:*

**In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].**

*c. Intervening cause:*

*\*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:*

**\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].**

NOTES ON USE FOR 403.12

1. Instruction 403.~~40a~~12a (legal cause generally) is to be given in all cases. Instruction 403.~~40b~~12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.~~40e~~12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 403.~~40a~~12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 403.~~40b~~12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 403.~~40e~~12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozzer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So.2d 520 (Fla. 1980).

5. “*Probable*” results. The committee recommends that the jury not be charged that the damage must be such as would have appeared “probable” to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term “reasonably foreseeable” is used in place of “probable.” The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.

6. The term “substantially” is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be

regarded as a legal cause. “Substantially” was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant’s negligence, *Loftin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff’s contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).



### **403.13 PRELIMINARY ISSUE**

**(Reserved)**

#### **403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE**

**If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].**

**~~If, however,~~ However, if the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].**

#### **NOTE ON USE FOR 403.14**

The bracketed language is for use if claimant makes alternative claim(s) of liability.

### 403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) claim against (defendant) are:

*a. Express Warranty:*

**whether** (the product) **failed to conform to representations of fact made by** (defendant), **orally or in writing, in connection with the [sale] [transaction], on which** (name) **relied in the [purchase and] use of the product, and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*b. Implied Warrant of Merchantability:*

**whether** (the product) **was not reasonably fit for either the uses intended or the uses reasonably foreseeable by** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*c. Implied Warranty of Fitness for Particular Purpose:*

**whether** (the product) **was not reasonably fit for the specific purpose for which** (defendant) **knowingly sold** (the product) **and for which** (claimant) **bought** (the product) **in reliance on the judgment of** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*d. Strict Liability — Manufacturing Defect:*

**whether** (the product) ~~[was not built according to made differently than its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer]~~ **and** (the product) **reached** (claimant) **without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

*e. Strict Liability — Design Defect:*

**whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant) without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).**

*f.e. Strict Liability — Failure to Warn:*

**whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*g.f. Negligence:*

**whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

*h.g. Negligent Failure to Warn:*

**whether (defendant) negligently failed to warn about particular risks involved in the use of (the product), and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).**

#### NOTE ON USE FOR 403.15

Instruction 403.15(e) retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. See Instruction 403.7(b) and Note on Use 3. Pending further development in the law, the committee takes no position on whether the consumer expectations and risk/benefit tests should be given alternatively or together.

403.16      **ISSUES ON CRASHWORTHINESS AND “ENHANCED  
INJURY” CLAIMS  
(RESERVED)**

~~[In addition, there is a second set of issues you must also decide in this case.]\*  
(Claimant) [next] claims [he] [she] suffered [greater] [or] [additional] injuries in  
the accident than [he] [she] would have otherwise suffered if (describe the alleged  
crashworthiness defect) had not been defective. (Claimant) does not claim that  
(describe the alleged crashworthiness defect) caused the accident.\*\*~~

~~\*Use the bracketed language when there are other defect claims in the case.~~

~~\*\*The defendant is entitled to have the jury instructed on this last sentence  
“when appropriate.” D’Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001).~~

~~The issues you must decide on this claim are whether (describe the alleged  
defective part of the product) was defective and, if so, whether that defect was a  
legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for  
whose injury claim is made) that was [greater than] [or] [additional to that which]  
[he] [she] would have suffered if (describe the alleged defective part of the  
product) had not been defective.~~

~~A product is defective if it is unreasonably dangerous when it leaves the  
possession of the [manufacturer] [seller] [distributor] [supplier] [importer]  
[defendant] and the product reaches the user or consumer without substantial  
change affecting that condition.~~

~~A product is unreasonably dangerous to [the user] [a person in the vicinity of  
the product]\* if [the product fails to perform as safely as an ordinary consumer  
would expect when used as intended or when used in a manner reasonably  
foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]].~~

~~\*When the injured person is a bystander, use the language in the second set of  
brackets. See West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976), and  
Sanchez v. Hussey Seating Co., 698 So.2d 1326 (Fla. 1st DCA 1997). See 403.7  
note 2.~~

~~Normally a defendant is responsible for only [loss] [injury] [or] [damage]  
caused by its product and not the actions of others. If you find that the (describe the  
alleged defective part of the product) was defective and that defect caused [loss]~~

~~[injury] [or] [damage] to (claimant) that was [greater than] [or] [additional to that which] would have resulted from the accident if (describe the alleged defective part of the product) had not been defective, you should try to separate the damages caused by (describe the alleged defective part of the product), determine what part of (claimant's) [loss] [injury] [or] [damage] resulted from (describe the alleged defective part of the product), and the actions of others and award (claimant) money only for those damages caused by (describe the alleged defective part of the product). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).~~

#### NOTES ON USE FOR 403.16

1. ~~The term “enhanced injury” is not used in this instruction. Although cases use that term, the committee believes that “enhance” has a connotation not appropriate for describing traumatic injuries. More appropriate terms might be “aggravated,” “increased injury,” or “separate injury.” For that reason, the committee has used quotation marks for the term “enhanced injury” in the title to this instruction. Although many of these claims involve motor vehicles, there is no reason the same principle would not apply to any “enhanced injury” claim regardless of the product involved.~~

2. ~~Use this instruction for “crashworthiness” claims instead of instruction 403.15. But instruction 403.15 should be used together with this instruction when there is also a defect claim that does not involve a claim of an “enhanced injury.” In cases in which there is a claim that one defect caused the accident but a different defect caused an “enhanced injury,” it may be necessary to identify the separate defects.~~

3. ~~It is not necessary to repeat the definition of defectiveness in paragraph 2 of this instruction if it has already been given as part of earlier instructions.~~

4. ~~This instruction retains the risk/benefit test for product defect, which previously appeared in PL 5. As noted in Note 3 to instruction 403.7, pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard of product defect or an affirmative defense. See 403.7, 403.18. The risk/benefit test is provided in both instructions to illustrate how it is used in either case. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.~~

In 2011, the legislature amended F.S. 768.81 to state that in a products liability case where the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the legislature intended this amendment to overrule the decision in *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001). See Ch. 2011-215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

### **403.17 BURDEN OF PROOF ON MAIN CLAIM**

**If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendants) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence ~~does~~ supports [one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].**

**[However, if the greater weight of the evidence supports (claimant's) claim against one or [both] [more] of the defendants}, then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them].**

#### **NOTE ON USE FOR 403.17**

Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.



## 403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

**On the [first]\* defense, the issue[s] for you to decide [is] [are]:**

*\*The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

*a. Comparative Negligence:*

**whether (claimant or person for whose injury or death claim is made) was [himself] [herself] negligent \*in (describe alleged negligence) and, if so, whether ~~sue~~that negligence was a contributing legal cause of the injury or damage ~~complained of~~ to (claimant).**

\*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

*b. Risk/Benefit Defense:*

**whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.**

### NOTE ON USE FOR 403.18b

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (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). Pending 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 court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

*c. Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

~~Florida Statutes section~~ F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S. 90.301–90.304*; *Universal Insurance Co. of North America v. Warfel*, 82 So.3d 47 (Fla. 2012); *Birge v. Charron*, 37 FLW S735 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

*d. State-of-the-art Defense:*

**In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product's) manufacture, not at the time of the loss or injury.**

NOTE ON USE FOR 403.18d

Instruction 403.718d applies only in defective design cases. *F.S. 768.1257*.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). Model Instruction 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Instruction 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

### 403.19 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 supports (claimant's) [claim] [one or more of (claimant's) claims], 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 damages [negligence] [fault] of [both] [all] defendants was caused by each defendant.]**

*\*Use the second bracketed language 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] [and] [(identify additional person(s) or entit(y)(ies))] were [negligent] [at fault] and that the [negligence] [fault] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form ~~the total amount of the damages and what percentage of the total damages is chargeable to each party~~ what percentage of the total [negligence] [fault] 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] [at fault] and that the [negligence] [fault] 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] [fault] of [both] [all] parties to this action [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.]**

*Use the following paragraph in cases without a comparative negligence defense but with an apportionment of 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] [at fault] and that the [negligence] [fault] 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] [fault] of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.**

NOTE ON USE FOR 403.19

*Preemptive ~~charges~~ instructions on defense issues.* If a preemptive ~~charge~~ 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, a ~~charge~~ instruction in the form of instruction 401.13 should be given immediately following instruction 403.15. If a preemptive ~~charge~~ 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 ~~charge~~ instruction announcing the ruling should be given immediately after framing the defense issues (instruction 403.1718).