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AMENDED APPENDIX D
Relevant excerpts from the Committee's minutes

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

MINUTES

Tampa, FL

Hillsborough County Edgecomb Courthouse

July 12, 2012 (1:00 p.m. to 5:00 p.m.)

July 13, 2012 (8:30 a.m. to 12:00 p.m.)

PRODUCTS LIABILITY

Vargas discussed the Florida Supreme Court's decision on the Committee's proposed products instructions; some were approved and some were sent back for further work. Supreme Court Clerk Tom Hall sent a letter to the Committee asking for a report on all remaining instructions to be completed by November 19, 2012. The instructions the Court wants the Committee to revisit are the definition of a defective product, the crashworthiness instructions (in light of the legislative history), the inference of defect instructions (*Cassisi* and government rules), and a few other minor instructions (preliminary issue and burden of proof). The Committee also needs to revise the model charges and verdict forms. Vargas has broken out five issues and assigned each to a subcommittee member. To meet the Court's deadline, the Committee's work must be done by the October meeting, with publication of proposals for comment by the October 1, 2012, issue of the Florida Bar News.

Barton noted Clerk Hall's letter said a motion for extension of the November 19, 2012, deadline can be filed. Barton also reported that he sent Clerk Hall an email with questions raised by the Court's decision. Vargas stated there were discrepancies between the appendix to the Court's decision and the Committee's appendix of instructions. For example, in instruction 403.7 (definition of strict liability), the Committee's proposal defined product defect using the consumer expectation test or the risk benefit test. The Committee substantially debated the definition of defect. The Court's appendix states that instruction 403.7 is "reserved," but the strike-through shows some changes to the proposal with different standards for manufacturing and design defect. This has confused many Committee members.

Kest noted that there were only two months until the publication date for the new proposals and advocated for requesting more time. Barton noted that his email to Clerk Hall asked if the Committee should try hard to meet the current deadline or should ask for more time. Clerk Hall has not yet provided an answer. Barton asked if the Committee believes it should request more time. Vargas asked if Barton's email, which raises some substantive issues, should be made a formal motion for rehearing. **Fox moved to immediately request an extension of the Court's November 19, 2012 deadline; Hinkle seconded; no objection from any Committee member. Boyer suggested requesting a firm deadline given the amount of time that has already passed on this issue. The Committee agreed to request an extension until April 15, 2013, which should give two meetings to discuss the proposals.** Barton said that, even though an

extension will be requested, the subcommittee should start working hard now. **Vargas will provide a revised timeline for the subcommittee's work.**

Barton also asked the subcommittee to review the recent Third DCA *Union Carbide* decision in re-crafting these instructions.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Jacksonville, FL

Duval County Courthouse

October 25, 2012 (1:00 p.m. to 5:00 p.m.)

October 26, 2012 (8:30 a.m. to 12:00 p.m.)

PRODUCTS LIABILITY

Barton reported that the Supreme Court has approved April 15, 2013 as the deadline for the Committee to submit its revised products liability proposals following the Court's opinion on its earlier proposals.

Vargas directed the Committee to the subcommittee's report (beginning on p. 131 of the materials), which details what the Committee submitted to the Court in 2009, what the Court approved, and what remains to be worked on. Most of the proposed instructions were approved. One remaining issue is instruction 403.7, defining strict liability. Another issue is the inference instruction; the Committee did not propose an inference instruction and the Supreme Court rejected this proposal without explanation. Another issue is the crashworthiness instruction, which the Court disapproved without comment. In developing revised proposals in response to the Court's decision, the subcommittee also sought to harmonize the proposals with the new Book and other revisions to the standard instructions after the products instructions were previously submitted.

Vargas noted that, although the Committee asked for clarification on certain issues following the Court's decision, no clarification was provided. The subcommittee did its best to work through the issues. Barton asked whether the Committee should ask for clarification again. Vargas said the Committee should move forward and use its best understanding of the Court's direction. But she noted that one area in which the Committee could ask for clarification concerns instructions 403.13 and 403.14. Vargas asked if this could be done by motion or letter. Barton said Clerk Hall reported that the Committee would receive a letter from the Court; he does not know if it will be just about the approved extension of time or also answer some of the Committee's requests for clarification. Vargas's concern is that the clarification questions are substantive. She believes the new report should just note the issues that were unclear and provide new proposals based on what the Committee understands the Court asked for. Barton agreed that the Committee should submit its report and the Court will do what is necessary.

a. 403.7 – Strict Liability

The Committee's previously-proposed instruction 403.7 combined manufacturing and design defects into one product defect instruction that included both the risk-benefit and consumer-expectation tests. The Supreme Court rejected that proposal. The subcommittee's new proposal (p. 145 of the materials) separates out the definitions of manufacturing and design defects, as was done in the prior PL 4 and 5 instructions. Vargas noted that everyone agrees that the risk-benefit test does not apply to manufacturing defects. However, in developing the previously-submitted proposal, there was substantial debate within the Committee about whether the risk-benefit test is a test for defect that is an element of the claim or an affirmative defense. The Committee's prior proposal used both the risk-benefit and consumer-expectations test and a note on use stated the Committee took no stance on whether the risk-benefit test was an element or an affirmative defense. The notes on use listed the cases under each test for the reader's consideration.

After receiving the Committee's proposal, the Supreme Court asked for comments on whether the instructions should comment on the risk-benefit analysis and whether to collapse the tests for manufacturing and design defects. The *Agrofollajes v. DuPont* case from the Third District came out in the interim and held that, in that case, the risk-benefit test applied and the consumer-expectation test did not. Vargas noted that the oral argument participants before the Supreme Court on the Committee's proposal all agreed that different tests are needed for manufacturing and design defects.

Vargas stated that, although the Court rejected the proposed 403.7, it did not provide much guidance for the Committee. In the appendix to its opinion, the Court separated out the instructions on design and manufacturing defects. The Court also removed the risk-benefit test in two places in the appendix (from instructions 403.7 and 403.15). But the Court did not remove a note on use to instruction 403.18, concerning affirmative defenses, which stated that the Committee took no position on whether the risk-benefit test was an element or an affirmative defense. Justice Pariente's concurring opinion, written to give the Committee guidance, stated that the definition of strict liability in the instructions has been in place since the 1980s. According to Justice Pariente, the Court and Committee should wait for an actual case or controversy to change the instruction defining strict liability.

The subcommittee also considered another intervening case, *Union Carbide v. Aubin* from the Third District, which suggests the risk-benefit test is an element and not an affirmative defense. Vargas hopes that the *Union Carbide* case will be decided by the Supreme Court and provide some guidance.

Given the foregoing, including the new *Agrofollajes* and *Union Carbide* cases, the subcommittee recommends retaining the two separate tests (consumer-expectation and risk-benefit) and updating the note on use to cite these new cases. This gives attorneys and judges the cases and allows them to make arguments as appropriate. Baggot added that the Committee is operating in a vacuum, as there is no clear law for guidance. Vargas agreed there is no clear law.

Baggot noted that the issue of whether the risk-benefit test is an element of the claim or an affirmative defense is important because of the discovery requests that follow when a defendant alleges the risk-benefit test as a defense.

Boyer believes the Supreme Court said to take the risk-benefit test out as an element. Boyer observed that the Court struck the risk-benefit test as an element from the proposed instruction. The Court's appendix (p. 194 of the materials) modifies the Committee's proposal (p. 246 of the materials) by deleting the risk-benefit test as part of rewording the instruction before striking it entirely.

Baggot does not agree that the Court clearly stated that the risk-benefit test should be taken out as an element. Vargas agreed with Baggot that it was not clear that the Court wanted the risk-benefit test out as an element. There is no further substantive guidance in the text of the opinion, other than in Justice Pariente's concurring opinion's suggestion to start with the old PL instructions. Lucas thinks it is reading too much into the decision to find that the Court was rejecting the risk-benefit test as an element. Vargas agreed, especially because of the new Third District cases recognizing it as an element. One of the Justices expressed concern at oral argument that the Committee had not considered some of the comments received after the Committee's submission, including the new *Agrofollajes* case. Since the Third District uses the risk-benefit test as an element, the Committee cannot make law by saying the risk-benefit test is not an element. Vargas believes it is premature to delete the risk-benefit test as an element without a case saying that expressly. Baggot noted that Justice Pariente said the same thing in her concurring opinion.

Barton asked what the subcommittee believed the strikethrough in the Court's appendix meant. Vargas assumes the Court was providing some guidance by rewording the proposed instruction and then striking it. But the Court and Clerk Hall have not provided clarification or guidance on that point in response to the Committee's inquiries. Kest believes the strikethrough means the Court thinks its reworded language is not sufficient. He thinks the Committee needs guidance from the Court on what it meant; he does not think there is a starting place without guidance. Kest noted they could have put nothing there and said "reserved." Hinkle believes the Court tried to rework it, found it difficult, stopped, and sent it back to the Committee for a first draft.

Lang found Justice Pariente's concurrence most persuasive, but it was unclear who she agreed with. Vargas and Barnett believe the Committee should work on the language in the instructions and submit a proposal to the Court. The Committee then began discussing the subcommittee's new proposals.

i. 403.7a – Manufacturing Defect

Vargas directed the Committee to the subcommittee's proposed manufacturing defect proposal (p. 145 of the materials):

a. Manufacturing defect

A product is defective from a manufacturing 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 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.

Barnett found the proposed language confusing. Vargas noted the language is from the old PL 4 (p. 230 of the materials), as that is what the subcommittee gleaned was what the Court wanted. The language is close to what the Court rewrote and then struck through in the appendix to its recent decision.

Barnett suggested revising the instruction to say “a product has a manufacturing defect if . . .” Ingram believes there needs to be a defective product for liability, not just a product with a defect in it. Barnett asked if they meant “a product is considered defective if....” Vargas said that was the goal.

Barnett and Boyer questioned the language “substantial change *affecting that condition.*” Vargas thinks the change needs to affect something related to the defect, not just a change in the product. Hinkle suggested “affecting the defective condition.” Barnett suggested “affecting that unreasonably dangerous condition.” Lucas and Vargas found that suggestion unwieldy. Wiggins suggested taking out manufacturing defect from the beginning and putting it in “affecting that condition.”

Barnett asked if they can remove the term “manufacturing defect” from the instruction since it’s in the title; but it was noted that the titles are not read to the jury. Barton stated it needs to be in the text of the instruction.

There was concern expressed about the “from” language in the first line and what can be used to make that more clear, while still telling the jury it is a manufacturing defect. The old PL 4 instruction used “if by reason of.” Ingram suggested “as a result of.” Boyer wondered if the word “defect” can be removed in the first line. Kest believes there needs to be parallel language in the two proposals. Whitmore noted that the subcommittee’s proposal is the same as PL 4, with a Plain English revision. Barnett wondered if “conform to intended design” is Plain English. Whitmore believes the instructions should be left as they were; there is no law to authorize a substantive modification; the only changes should be non-substantive. Vargas said Stewart agrees that the Court said go back to PL 4 and 5.

Kest observed that this proposal uses only the consumer-expectation test as the test for a manufacturing defect. Vargas said that was correct.

Barton agreed that the Committee should go back to PL 4 and 5 and noted that this language is slightly different than what the Court rewrote in its appendix and then struck through as insufficient. Boyer does not believe the Supreme Court wants the old PL language, as it has asked for more Plain English instructions.

Hinkle suggested changing “from” to “because of” and changing “does not conform” to “is different from.” Baggot asked if there was a substantive difference in changing “does not conform.” Wiggins believes that phrase is a relic of an old case and no one has ever tried to improve it. Whitmore believes there is a difference between “does not conform” and “is different from.” Baggot thinks more time is needed to consider these changes and whether they are substantive. Vargas suggested “was not built according to its intended design.” But others noted that some products are not “built.” Ingram asked if the second “intended” in the last sentence is needed, as he does not know of an “unintended” design. Kest said he has a case where the designer was saying the product as manufactured was not what he intended. Kest asked if there was a reason. Hinkle believes there may be a reason for the second “intended.” Boyer believes “intended” should be taken out to see if the Supreme Court approves. Ingram believes it is mixing apples and oranges to use “intended” with “design.”

Barton asked Fox if the language in the old PL instruction has caused any confusion, and Fox said it is not a problem. Barton noted that, despite the goal to make everything Plain English, this is one where the old language may need to prevail because it has worked for years. After the extended discussion, the open issues for the Committee to still consider are the change from “conform with” to “different from” and whether to retain the word “intended” before design.

ii. 403.7b – Design Defect

The Committee next considered the subcommittee’s design defect proposal (p. 145 of the materials):

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].

The Committee discussed making the same change as in the manufacturing defect instruction to take out “from” in first line and replace it with “because of.”

Vargas noted this design defect proposal is the same as the old PL 5, with some changes to comport with the format of new Book. Barton asked what those changes were. Vargas said they changed “if by reason of” to “from” and that was pretty much it. Barton said the report should state these changes are more stylistic than substantive. Ingram suggested changing “foreseeable by” to “foreseeable to.”

Vargas agreed. Barton was unsure. Kest, Barnett, and Fox stated “by” should still be used. That was the consensus.

iii. 403.7 – Notes on Use

Vargas stated the subcommittee recommends changes to some of the notes on use (pp. 146-47 of the materials). Note 1 deletes a discussion about language to be added to the instruction in the case of a manufacturing defect. Note 3 adds references to the *Agrofollajes* and *Union Carbide* cases. Ingram noted an extra comma in the second reference to *Agrofollajes*. Note 4 changes some language about the *Force* decision.

b. 403.15 – Issues on Main Claim

Vargas directed the Committee to the subcommittee’s related proposal to modify instruction 403.15 (p. 156 of the materials), even though the Supreme Court approved that instruction as written. The subcommittee recommends revising 403.15 to separate out the manufacturing and design defect issues that were collapsed in the Committee’s prior submission. The subcommittee also recommends adding back the risk-benefit test.

Kest wondered why the Committee was seeking to change something the Court had already approved. Barton and Vargas explained that these changes are a natural extension of the changes to 403.7. Barton further noted that Kest’s concern was one of the clarification questions the Committee asked, which the Supreme Court has not yet answered. **Barton said this reason for changing an approved instruction would be explained in the report to the Court.** Vargas noted that the Court’s decision said the whole package of products instructions is not approved until all individual instructions are approved, implying that some approved instructions would need to be revisited (as the Committee is doing here).

Ingram asked if the changes made to 403.7 during this meeting should also be tracked into this instruction. Vargas noted that “intended” is used in 403.15, which raises a similar issue. It also uses “built,” and Baggot has noted that all products are not “built.” Wiggins believed that some action – built, made, etc. – is needed.

Barton adjourned the meeting at 4:45 p.m.

FRIDAY – OCTOBER 26, 2012

Barton called the meeting to order at 8:35 a.m.

The Committee thanked Boyer and his wife for Thursday’s outstanding dinner at their home.

Before the substantive discussion, Barton asked Jennings to discuss the new format of the CD/DVD of the Committee’s materials. Jennings explained that the disc contains the current agenda, previous minutes, and relevant materials for subcommittees. The immediate tab goes back to 2008, and there is a tab for archived materials with all the historical information available. The new format of the disc also has tabs for each current subcommittee that contains materials for that subcommittee for the meeting. If the subcommittee has nothing for the

meeting, the tab will be there but empty. **Barton asked subcommittees to advise Jennings of what materials the subcommittee wants moved to the tab for the materials for that subcommittee that is relevant to the meeting at hand.**

PRODUCT LIABILITY (CONT'D)

c. 403.7 – Strict Liability (cont'd)

Vargas began by referencing the issues left on the table from yesterday.

i. 403.7a – Manufacturing Defect (cont'd)

On the issue of whether to use the language “conform to its intended design” from the old PL 4, Vargas believes that language should stay in the instruction. She believes it is appropriate because *Union Carbide* cites the Restatement (Third), which still uses that “conform to its intended design” language. Baggot said his colleagues believe changing that language is improper; the language distinguishes a manufacturing case from a design case and eliminates looking at the case from a manufacturing perspective. He believes “intended” means something more than just a little something wrong with the design.

On the issue of whether to use “different from” instead of “does not conform to,” Baggot said that, if the last case discussing the issue uses that definition, the instructions should use that language. Barton noted that there is a desire to use Plain English rather than legalese from case law. Baggot believes “does not conform to” is different than “different from” and is not legalese. He believes “different from” may set a lower bar. Whitmore agrees that the language used is important, is there for a reason, and should not be changed without a reason. Kest said that it is important to define terms that may be legalese. He believes that jurors may not understand and ask what “does not conform to” means, and that judges may give different definitions. Vargas thinks “is different from” is a good Plain English substitution, but she is not sure if it is a substantive change and there is no case law guidance. Ingram noted that, if there is any substantive significance to the change, it should not be made, especially because “conform to” is not that far afield. Lytal likes “is different from”; it is Plain English, and he believes the rest of the instruction provides the clarity needed for any confusion that change may make. Wiggins agrees to using “is different from” because of the overarching directive from the Supreme Court to make the instructions Plain English. Baggot noted that products cases are technical and precise, and he thus does not agree with broadening the language about what the standard is for the jury to look for. Barton said the Committee can include in its report that it does not believe it is a substantive change. He does not believe the language at issue is used by technical people in the field and thus believes witnesses will quickly adapt to any changed language. He referenced a change in the medical malpractice instruction about language about the standard, and he recalls that experts quickly picked up on the change and made it really non-substantive. Boyer agrees with the Plain English change. Baggot asked if any Plain English change has been rejected by the Supreme Court. Barton said that occurred with the second sentence of

the definition of greater weight of the evidence. Baggot asked if this change would be analogous. Vargas noted that the Committee's last proposal, which was rejected, did not use "does not conform." She suggests going back to the PL language. Baggot believes that "different from" is easier to meet.

Lytal moved to adopt yesterday's proposal with "is different from" as follows:

a. Manufacturing defect

A product is defective because of a manufacturing 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 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.

Boyer and Wiggins seconded the motion. The motion passed 7-5. Barton noted that this is not a substantive change but a Plain English change, which should go in the report and in a note on use. Boyer suggested noting this was almost the same as PL 4. Vargas said that can be noted in the report to the Supreme Court.

ii. 403.7b – Design Defect (cont'd)

Vargas believes the risk-benefit test is viable as an element of the claim and both the risk-benefit test and consumer-expectation test should be included in the Committee's new 403.7b submission to the Supreme Court. Per the *Union Carbide* case, which was decided after the Supreme Court's original products decision, Vargas believes the risk-benefit test is viable as an element of the claim.

Boyer asked how the subcommittee's proposed language compares to the old PL 5 (p. 230 of the materials). Vargas noted the changes were to put it in the format of the new Book and to change "from" to "because of."

After the Committee's discussion, the language for 403.7b was:

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]] [or] [the risk of danger in the design outweighs the benefits].

iii. 403.7 – Notes on Use (cont'd)

Vargas stated that the subcommittee's proposed revisions to Note 1 deleted some language that had been added when the manufacturing and design defect instructions were collapsed and can be updated with information about the non-substantive change in the language of "is different from." Note 3 was updated to refer to the *Union Carbide* and *Agrofollajes* cases. Boyer observed that, if *Union Carbide* adopts the Restatement (Third) and the Supreme Court approves that, it would be a substantial change in the law. Vargas stated that a notice to invoke the Supreme Court's jurisdiction has been filed in the *Union Carbide* case. Barton observed that the Third District declined to certify conflict in *Union Carbide*, and the Supreme Court thus may not take up the case. Baggot noted that the case will not be decided, in any event, by the Committee's April 2013 deadline for submitting the new products instructions. Vargas stated that Note 4 had a similar change.

d. 403.15 – Issues on Main Claim (cont'd)

i. 403.15d – Manufacturing Defect

The subcommittee's proposed revised 403.15d (p. 156 of the materials) is:

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 (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).

Ingram asked if the "substantial change" should affect the condition that makes it defective. He noted that, here, it says "affect the condition *in which it was sold*" without it affecting the defective condition. Ingram and Hinkle suggested making the language parallel to the language in 403.7. Wiggins believes the rest of the language after "and" clarifies the issue and does not require any change in the language. Ingram asked if anything is affected by removing the "in which it was sold" phrase. Baggot believes that liability is only imposed on someone in the chain of distribution – e.g., Enterprise Rent-a-Car is not liable for putting a defective car on the road. Wiggins stated the original language was something like "left the hands of the manufacturer," which is more precise. Lytal, Ingram, and Boyer advocated for removing the "in which it was sold" language.

Vargas noted the need to make the "is different from" change here, which was made to 403.7, and suggested replacing "was not built according to" with "is different from" and then removing completely "in which it was sold." Lytal suggested "was

built different.” It was noted that drugs are not “built.” “Made” was suggested. Boyer suggested “manufacture.” Barnett believes “manufacture” is Plain English. Vargas suggested “made differently from its intended design.” Boyer liked it. Ingram suggested “made differently than its intended design.”

Barton noted that the brackets around the first clause could be removed because it is now not optional language since this refers only to a manufacturing defect. Lytal asked if “that failure” should be changed to “that difference.” Vargas and Barton believed “failure” was needed. Ingram observed that there were many “and”s in the proposal. But he and Vargas believed they were all needed in order to be clear that they were all required elements. Boyer said that it is the product that fails to perform, not the intended design that fails to perform. Boyer suggested changing “perform as safely as the intended design would have performed” to “perform as safely as intended.” Kest suggested a coma after “intended design” to provide clarity. Barton asked if Boyer’s suggestion left the issue of intent ambiguous; it should be clear that it is the intent of the designer that controls. Ingram believes, in common parlance, a “design” can perform. Lytal believes designs perform. Sass suggested adding “the product” after “thereby,” but others believed that was not necessary.

Barton said there was a desire to make this instruction as close to the PL instructions as possible, so the Committee should use that language unless it comes up with something better. Baggot believes there are a lot of changes here for Plain English which he believes may have substantive impacts. Boyer noted that the Committee consensus in the past was that the PL instructions were really not a correct statement of the law. Vargas noted that the Supreme Court should be told why this 403.15 is being changed even though it was preliminarily approved – because it must be consistent with changes to 403.7. Barton agreed. Fox believes that, if the language is wrong, it should be changed. Baggot asked for case law showing the PL language is wrong.

The Committee’s discussion resulted in the following proposal:

d. Strict Liability -- Manufacturing Defect:

whether (the product) was made differently than its intended design, and thereby failed to perform as safely as intended 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).

Lytal moved to approve this proposal; Fox seconded. It was approved 11-2. Vargas noted there will be a chance to talk about it again after it is published for comment. Barton agreed there will be other opportunities to discuss it further. Vargas suggested circulating the new proposals to old Committee members Stewart, Lumish, and Caldwell for their comments. Baggot asked about the minority report process, and Barton explained it.

Boyer asked about transition language in 403.15 between the different issues for determination. He suggested “there are several issues” and “the next issue” as a transition. Vargas noted that judges and lawyers can add that, and that the current proposal is consistent with the format of the new Book.

ii. 403.15e – Design defect

The subcommittee’s proposed revised 403.15e (p. 156 of the materials) is:

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).

Vargas noted the language is straightforward and the same as what was preliminarily approved as 403.15d. Wiggins said that the “in which it was sold” language, removed from 403.15d, should be removed from 403.15e for consistency; Vargas agreed. Boyer asked when the bracketed “and” or “or” is used. Vargas said that is something the Committee does not take a position on. Baggot said that is an issue for debate. Vargas said a note on use could be added here, like the one in 403.7, for when each test should be used. Boyer asked if, in the Committee’s report, the Supreme Court should be asked whether to include “and,” “or,” or both. Lytal asked if “as intended” was necessary since “in a manner reasonably foreseeable” covers that topic. Barton noted that 403.7b uses both phrases. Wiggins noted that it cuts close to a substantive change. It was decided to be left in.

The Committee’s discussion resulted in the following proposal:

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).

Wiggins moved to approve the proposal; Ingram seconded. The proposal was approved, with one opposition by Baggot based on removing the “in which it was sold” language.

e. 403.16 – Crashworthiness

Vargas reminded everyone that the Committee had developed an instruction, after thorough debate, on increased injury from a lack of crashworthiness, which the Committee believed was consistent with *D’Amario v. Ford*. In *D’Amario*, the question was whether the jury could consider the negligence of the driver in an action against the car’s manufacturer for lack of crashworthiness, and the Court held that the negligence of the driver could not be introduced because a car manufacturer should assume such negligence and it is therefore not relevant in a crashworthiness case. But, in 2011, after the Committee submitted its proposal, the legislation was passed (pp. 135-37 of the materials) to retroactively overrule *D’Amario*, so that the defendant is treated the same as any other tortfeasor; the jury shall consider the fault of all involved.

The Supreme Court rejected the Committee’s proposed crashworthiness instruction without explanation from the majority. Justice Pariente’s concurrence referenced the legislative change as the basis for the rejection. The subcommittee believes the legislation is intended to overrule *D’Amario* and is controlling until struck down as unconstitutional. After considerable debate, the subcommittee decided that, since the legislation says to treat them all as regular tortfeasors, the current instructions on causation and damages suffice. There is also an enhanced injury instruction (403.2) already approved. Thus, an actual crashworthiness instruction does not appear necessary. The subcommittee proposed a note on use (p. 158 of the materials) explaining the legislative change:

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.

Kest questioned if the standard causation instructions are adequate if the design-related conduct occurred so long ago. The subcommittee understood the concern but believes the language is adequate.

Baggot asked if the language “greater or additional” injury in 403.2 was from the statute. He believes “enhanced” is the key. He suggests using the statutory language, which is limited to “greater than” and not “additional.”

Baggot stated that he questions whether a crashworthiness cause of action even exists anymore. Ingram noted this harkens back to *Stuart v Hertz* principles regarding multiple causes and how they interact. Fox noted the legislation focuses on the cause of the

accident, rather than the cause of the injury, which is the important issue. Ingram observed that the definition of “accident” has been broadened in the statute to include crashworthiness and medical negligence. Hinkle noted that, per the statute, now every potentially responsible party is a defendant.

Kest stated that the “intervening cause” instruction creates confusion here, especially where the crashworthy design was decades earlier. But Kest also noted that changing that part of the legal cause instruction is not before the Committee now and would require extensive work and discussion.

Baggot asked if “greater or additional” should be used in the note. Barton asked Vargas if it was possible to use the language of the statute, and Vargas said it was fine to use “greater” and delete “or additional.” **Ingram moved to approve the subcommittee’s proposed note on use without “or additional”; Boyer seconded; unanimously approved as follows:**

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 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.

Vargas asked if the change to delete “or additional” also needs to be made to 403.2 (p. 185 of the materials), which also uses “or additional.” Her instinct was to stick with what was preliminarily approved. Barton noted 403.2 was submitted before the statute. Vargas asked if this would affect other causation instructions. Baggot believes it should be changed. **Ingram moved to remove “or additional” from second sentence of 403.2; many seconded; unanimously approved.**

f. 403.11 – Inference of Product Defect or Negligence

As background, Whitmore stated that the Committee had decided not to submit a standard instruction on inferences to be drawn from compliance with government rules or malfunctions during normal operations. The Supreme Court asked the Committee to reconsider the issue.

i. The Government Rules Presumption

Whitmore said section 768.1256, Florida Statutes, provides for a rebuttable presumption to be drawn about product defect and liability based on compliance (or lack of compliance) with applicable government rules. The Committee had drafted and published an instruction on the government rules defense in 2008. Comments

were received, one of which was about the effect of the presumption – *i.e.*, vanishing or burden-shifting. The Committee had substantial debate about that issue, resulting in a stalemate due to the lack of any clear guidance in the statute on the effect of this presumption. The Committee instead proposed a note about not knowing the effect of this presumption and thus its inability to formulate an instruction on it. Whitmore did research on the statute, and there is still no guidance on the type of presumption provided by this statute. Since there has been no further guidance, the subcommittee proposes the same note submitted before for 403.11 (p. 149 of the materials):

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.

Vargas noted the addition of the cite to the *Warfel* case that involves a jury instruction on a presumption and explains that a vanishing/bursting bubble presumption does not require an instruction, while a burden of proof presumption does require a presumption.

Whitmore noted that the subcommittee attempted to draft an instruction (p. 150 of the materials), starting where the Committee left off in 2009. The subcommittee decided it could not develop something. There were multiple options for the instruction and, without case law guidance, the subcommittee does not know which option to use. Boyer asked if both options could be presented to the Supreme Court – a note and an instruction – and ask the Court to decide which route it likes. Jennings did not know if that was workable. Whitmore added that, without a case, it would tough for the Supreme Court to make that decision. Whitmore observed that, in the past, the Committee has said in these instances that the Committee takes no opinion pending further development in the law. Vargas noted that Ehrhardt’s treatise states that it is unknown what type of presumption this statute creates.

Kest asked if this is a real issue that people are facing that should be addressed. Vargas said Kathleen O’Connor argued for this instruction to the Supreme Court, but Justice Pariente noted that there were no cases in the pipeline on it. **Ingram moved, Fox seconded, to adopt the subcommittee’s suggested note on use 1 (p. 149 of the materials) instead of an instruction. Unanimously approved by the Committee.** Barton asked if the Supreme Court had requested an instruction, and Whitmore said that the Court just said to reconsider the issue.

ii. Cassisi

Vargas stated that the Committee considered the *Cassisi* inference in 2004 and submitted a note on use stating that no instruction was needed for it. Vargas said disagreement exists about when the *Cassisi* inference arises; some believe that the

product just needs to malfunction, while others believe the product must malfunction and be destroyed in the process. The *Gencorp* case, cited in the old note on use for the PL instructions, holds no instruction should be given on the *Cassisi* inference. The subcommittee recommends resubmitting the same note on use submitted in the last products submission (p. 149 of the materials), as the law has not changed:

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).

Barton noted that this note on use is not the same as the one from the PL instructions, which included only the second sentence above. Ingram asked if the current note is a substantive change from the PL note because the first sentence now states what *Cassisi* actually holds. Vargas said the current note was vetted last time, was published for comment, the Supreme Court did not state it was wrong, and is a correct statement of the law. Baggot wondered if the language should be qualified “*Cassisi* holds, *among other things*, that . . .” **Ingram moved to adopt the subcommittee’s above proposed note on use, Boyer seconded, unanimously approved.**

g. Miscellaneous – 403.13 and 403.14 (p. 141)

Whitmore stated that it was difficult for the subcommittee to reconcile what the Supreme Court did with respect to its rulings on proposed instructions 403.13 – Preliminary Issue and 403.14 – Burden of Proof on Preliminary Issue. The Court rejected the proposed 403.13 (p. 255 of the materials) without explanation and referred it back to make revisions consistent with other instructions preliminarily approved. At the same time, the Court approved 403.14, which provided a burden of proof instruction for the struck 403.13 preliminary issue. This was tough to reconcile. The Committee sought clarification on this but did not receive any. Whitmore believes there must be a preliminary issue instruction and suggests resubmitting the same 403.13, as there is no real other way to handle it. There is a minor suggested edit to 403.14 (p. 155 of the materials) to be consistent with the new Book.

Barton asked if there was ever any comment in the history of this instruction as to why 403.13 was not approved, or whether the instruction is an incorrect statement of the law. In the absence of that, there is nothing to indicate what is wrong with the proposal. Whitmore does not believe the issue was addressed during oral argument and no one had really commented on it. Barton noted that the Committee was not divided on this instruction; Vargas agreed.

Whitmore said that, if any issues should be pushed for clarification from the Supreme Court, this may be one. Fox urged pushing the Court for clarification. Jennings said that has been tried and never been successful. Barton said he will try again. Kest suggested the report note the Committee's efforts to get clarification as a reason why the Committee is resubmitting the same proposal. Jennings said the Supreme Court could possibly be receptive to a motion for clarification.

Ingram moved to resubmit the same 403.13 (p. 255 of the materials) and revised 403.14 (p. 155 of the materials); Wiggins seconded. Whitmore noted 403.14 has a minor, non-substantive change. The Committee discussed that it should tell the Supreme Court that it changed them as a package to try to address the situation. Unanimously approved.

h. Errors & Omissions and Consistency Review

Vargas said the subcommittee went through all of the products instructions for consistency and in context with intervening court decisions.

Vargas said the 403.9 negligence instruction approved by the Supreme Court deleted the unreasonably dangerous/defect requirement. The subcommittee thus recommends deleting note on use 1 (p. 148 of the materials), which assumed that the plaintiff had to prove defect for the negligence claim. Barton agreed with deleting it and its old case law. **Ingram moved, Boyer seconded, to delete note 1 to 403.9 and reorder the remaining notes to 403.9 appropriately. Unanimously approved.**

Vargas said instruction 403.12's notes on use had a bad cross-reference to 403.10 instead of the correct reference to 403.12 (p. 153 of the materials). Ingram noted that there should be no spaces between 403. and 12a in the notes; Vargas agreed.

Vargas said instruction 403.17 (p. 159 of the materials) has minor changes to make it consistent with reorganized Book. An "s" was added after defendant in first paragraph. "Does" is deleted and an "s" added after "support" in the second paragraph. An "[or]" is added and a bracket moved from after defendant to the end of paragraph in third paragraph. Instruction 402.1 was used as a model for these changes. Jennings noted that the second paragraph should also have "defendant(s)," as in the first paragraph.

Vargas said that instruction 403.18 (p. 160 of the materials) has minor changes to make it consistent with the reorganized Book's negligence instruction. Barton observed that the Supreme Court said this instruction was approved as modified, but there were no modifications in the appendix.

Vargas said instruction 403.19 (p. 162 of the materials) has minor changes to make it consistent with reorganized Book. In addition, this instruction asked the jury to apportion "damages" between defendants, and typically they apportion "fault" between defendants. This has been corrected. There was also a change made consistent with the current E&O report pending before the Supreme Court. The subcommittee also made some changes to the note on use, changing "preemptive charges" to "preemptive instructions" and correcting a bad cross-reference.

Vargas said the Florida Supreme Court also asked the Committee to look at the model charges and verdict forms. Vargas believes the instructions and notes should be finalized first before the models. **Barton said that should be in the report and explained.** Vargas said the Committee can look at models at the next meeting after publication of the instructions discussed at this meeting. Ingram and Hinkle agreed with that approach. Vargas observed that the model charges and verdict forms are also in the process of being revised. Whitmore said there are likely to be changes in the instructions before looking at the models. Ingram agreed. There was no opposition to tabling the models for now.

Barton asked Vargas to circulate the final product of this meeting to the full Committee for review. Barton asked when these revisions can be published for comment. Vargas thought they could be published in the December 1st Florida Bar News for comment. **Comments will be reviewed, and a subcommittee report on the comments will be distributed to the full Committee before the next meeting.**

Kest asked if a response will be received from the Supreme Court to the Committee's clarification questions and whether the Committee should wait for that. Barton said there might be answers but he was unsure.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

**Coral Gables, FL
Office of Kozyak Tropin & Throckmorton
(Hosted by Neal Roth)**

March 7, 2013 (1:00 p.m. to 5:00 p.m.)

March 8, 2013 (8:30 a.m. to 12:00 p.m.)

PRODUCTS LIABILITY

Barton discussed the history of the Committee's extensive work on standard instructions for products liability claims that brought us to this point, with instructions from the Supreme Court on certain proposals that still need work.

Vargas noted publication of the new proposals (pp. 47-82 of the materials). Four comments were received (some are in materials (pp. 83-88) and some were emailed separately because they came in late). The subcommittee met by phone, considered the comments, and distributed a report to the Committee by email with recommendations on the comments and new proposed revisions to the instructions based on the comments.

Three sets of comments came from attorneys who primarily represent plaintiffs in West Palm Beach and raised essentially the same four issues. One set of comments was received from two attorneys who primarily represent defendants.

i. Post-sale duty to warn

The first comment from the plaintiffs' attorneys concerned 403.10 (p. 66 of the materials), which was that the instructions should be revised to make clear that the duty to warn includes incidents or accidents that occur after the sale of the product. They cited cases to support this proposition. Sales circulated another case holding the same. The subcommittee agreed with the comment that a defendant does have a post-sale duty to warn of dangers that become known after the sale but that the current proposal covers it and is legally correct. One member of the subcommittee disagreed. The subcommittee wants to further explore the issue and recommends deferring on the issue of whether a note on use is appropriate until after sending up the revised instruction.

j. Preliminary issue instruction 403.13 and 403.14

The second comment from the plaintiffs' attorneys concerned 403.13-.14 (pp. 71-72 of the materials) regarding burden of proof on the preliminary issue. The Committee has previously discussed that it is unsure precisely what the Supreme Court wanted on this instruction based on different aspects of its decision. The commenters believed the instruction could lead jurors to believe that a defendant held strictly liable must have been in a position to correct a defect in the product, even though strict liability is imposed on anyone in the distributive chain. Vargas noted that the note on use says the instruction is for a limited circumstance when a party is in the distributive chain but never has physical possession of the product, and that 403.7 should be used in most circumstances. 403.7 has a similar note that 403.13 applies to those not in physical possession. The subcommittee believes the comment is well-taken and the instruction may do more harm than good, even with the note on the instruction's limited purpose.

DeMahy agreed the instruction makes no sense and may confuse a juror, as physical possession and ability to correct are not elements of strict liability. Sales agrees it makes no sense in a design defect case. The origin of the instruction is *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102 (Fla. 4th DCA 2005), which is cited in the note. The subcommittee recommends putting "reserved" in 403.13 for the time being and to further consider it.

Barton suggested also removing note on use 6 to 403.7 (p. 63 of the materials) that refers back to 403.13. While Vargas generally agreed, the subcommittee had not considered that specifically. Ingram suggested changing that note 6 to cite *Rivera*. Vargas and Hinkle agreed with that suggestion. Ingram also suggested using a modified version of note 1 to 403.13 as a note for 403.7. Vargas believed that worked with a revision to say that "this instruction may need to be modified...."

DeMahy asked the legal significance of whether a defendant had physical possession of the product to a strict liability claim since all in the distributive chain are liable. Ingram noted that the standard instruction on defect does not discuss those others in the distributive chain. Sales' concern is that the instruction does not tell jurors that those other than designers and manufacturers are equally liable for the defect. DeMahy agreed that the instruction does not appear to cover the full scope of strict liability law. McCloy noted that 403.2 touches on that issue, but DeMahy said that is just introducing/defining

the plaintiff's claim. Ingram asked if 403.15(d) covers it. DeMahy stated that the instructions define manufacturing and design defects but do not tell jurors who are liable. Vargas said that each party in the distributive chain was added to 403.2 in the recent revisions from the old PL instructions. DeMahy noted it was deleted from 403.7, but that is where it should be stressed in defining strict liability. Hinkle noted that *Rivera* was cited because the court used the standard instruction at the time and it was inadequate in that case involving a Chinese manufacturer. DeMahy believes "possession" is confusing in this instruction. DeMahy knows of no defense for someone in the distributive chain about not having possession. If the product is defective and the party is in the distributive chain, they are strictly liable. Sales thinks 403.13 is not a necessary instruction. Vargas agrees it should come out for now and deserves further discussion. Hinkle advocated for a note on use about the issue, as he thinks the issue will come up more and more with distribution of products manufactured in other countries. DeMahy thinks the issue is one of law and for summary judgment/directed verdict, not for the jury. Barton asked if there was ever a reversal for the lack of an instruction on this issue, and no one knew of any. Vargas noted that *Rivera* was a summary judgment, not jury instruction, case; the court rejected the trial court's use of the jury instruction as authority for "possession" being an element of the claim; it is not an element.

Barton noted the consensus appears to be to take out 403.13 and say reserved and take out note 6 to 403.7. The Committee considered possible revisions to note 6, but Vargas recommended removing it completely. Hinkle wondered if the jury should be informed why those in the distributive chain are there as defendants. DeMahy said 403.7 covers it because it refers to those in the distributive chain. Ingram asked, if that was so, why does 403.7 delete the reference to all the parties in the chain of distribution. Vargas explained that that Boyer was concerned that it should be consistent with old PL 5 (discussed at p. 42 of the materials).

DeMahy suggested an introductory phrase to 403.7: "A manufacturer, importer, seller, etc. are strictly liable for [define strict liability]." Vargas noted the desire of the Committee to go back to the PL instructions in substance, with the format of the reorganized book. DeMahy is concerned the jury is not sufficiently instructed in 403.7 regarding who is strictly liable. Vargas noted that 403.15 covers the issues for determination. DeMahy said that is not an instruction on the law. Barton noted that, by the time of trial, if the distributor is in the case, there is no basis to argue they should not be there for not having physical possession. Sales noted the counter-intuitive nature of strict liability for an average juror – that a retailer, which simply sells a product it is given, should be liable for selling a product they had no part in designing or manufacturing or changing. DeMahy believes his proposal is correct on the law and the jury should be instructed on the law. Ingram agreed that was the law but did not think an instruction was truly necessary. DeMahy noted that, at trial, the instruction would include only those types of parties in the chain that are there at trial and there would be no reference to the manufacturer or designer if the only defendant at trial is the distributor. Such an instruction would preclude a defendant from arguing they have no liability as a distributor. Although he did not really think it was needed, Sales suggested doing it more simply by putting that language at the end and making it optional for a case when it applies. Vargas thinks just plugging in the actual defendant and facts of the case

will advise the jury. Hinkle advocated for an introductory sentence similar to “[x] [y] and [z] are liable for a defective product that causes harm” and then define the defect. Sales noted his experience with a judge that discussed with the jury during *voir dire* that distributors are equally liable, but the judge would not repeat that concept when instructing the jury at the end. Sales sees this issue coming up more often.

Vargas suggested revising note 6 to say a special instruction is needed if the defendant is someone who did not have actual possession but is still strictly liable. That way, it is flagged as an issue. Russo noted that DeMahy’s concern is that the jury is never told who is liable if they find the product defective. Barton noted 403.15 may do it, but DeMahy does not think that covers it adequately. DeMahy agrees that an introduction or concluding phrase in 403.7 is appropriate to specifically identify which types of parties are strictly liable. Sales and Vargas believed that “strictly liable” is not a phrase that should be used in an instruction. DeMahy is fine with not using that exact language and just saying these parties in the chain are “liable.” Russo does not believe any instruction, even 403.15, tells the jury who is liable. Barton said 403.17 may do that.

Ingram observed that there is no instruction that “everyone who is negligent” is liable, so there is no need for that for a strict liability claim. DeMahy thinks strict liability is different than negligence because of the inherent doubt that jurors have that those simply in the distributive chain are liable; negligence is not as counterintuitive as strict liability. DeMahy thinks strict liability is unique, and it needs to be explained to the jury that everyone in the distributive chain is liable. Ingram thinks the instructions say that, maybe not as clearly as some would like, but they say that. Sales and DeMahy think a note on use may cover this issue sufficiently. Vargas directed the committee to note 6 (p. 63 of the materials) and suggested it be revised to cover this issue and state that a special instruction may be needed in some cases to advise the jury that everyone in the distributive chain is liable. DeMahy thinks “not in physical possession” is unnecessary and confusing; it is not an element of the claim. The Committee discussed the following proposed note:

When a distributor, importer, or intermediate seller played a role in placing the product into the chain of distribution, a special instruction may be needed so the jury understands the defendant is liable to the same extent as the manufacturer or designer.

Sales does not like citing *Rivera* for this note. Lang believes something should be cited, such as the other case cited in note 1 to 403.13, *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 (Fla. 1994). Sales has other cases he thinks could be cited there. Russo suggested different language for the revised note 6 to 403.7:

In some cases, it may be appropriate to instruct the jury that, in addition to the designer and manufacturer, any distributor, importer, or seller in the chain of distribution is liable for injury caused by a defective product.

The Committee approved this revised note 6 to 403.7, with citations to *Rivera* and *Friedland* and cases provided by Sales (including *Porter v. Rosenberg*, 650 So. 2d 79 (Fla. 4th DCA 1995)).

Lytal asked if this should be an instruction that should always be given with a defendant other than the designer or manufacturer. DeMahy agreed it should be in the instruction in an introductory statement. Ingram said the issue could still be considered, but that it should not be changed now, given that the instructions are technically correct and need to be finalized for submission to the Supreme Court. DeMahy thinks it should be there in the instruction because it is the law. Baggot asked if there are ever trials with only distributors, so why is this necessary in an instruction. Boyer said it can occur when the manufacturer is bankrupt. DeMahy said it occurs with big retailers where the manufacturers are out of the country. The Committee will continue to reexamine whether this should be a note or in an instruction, but will send this up as a note now. Boyer suggested developing a proposed instruction for the next meeting.

k. State of the art defense 403.18(d)

The third comment from the plaintiffs' attorneys concerned 403.18 on defense issues (pp. 79-80 of the materials), specifically subpart d concerning the state of the art defense. They say it is not a true "defense" that results in a defense judgment, which is what 403.19 says. Vargas noted that this defense comes from a statute and tracks the statutory language. Vargas noted that there was debate within the Committee as to where it should go in the book. The plaintiffs' attorneys commenting believe it does not belong in the "defenses." The subcommittee agrees that it is not a complete defense but that the instruction is a correct statement of the law and will not lead to confusion about being entitled to a defense judgment. The subcommittee's recommendation is to not make any change based on this comment.

Wiggins believes it is not a complete defense, but a defense to the discrete issue of whether the product is defective and may need specific language saying that. DeMahy believes it is a factual, not legal, defense that the product is not defective because it was made pursuant to the state of the art. The jury considers this evidence in determining whether the product is defective. Barnett asked if it is waived by not being raised in an affirmative defense. DeMahy does not think so, since it's a factual issue that will come out in discovery and with experts. DeMahy noted that there may be cases where state of the art does not matter because plaintiffs will argue that the defendant should have never made the product at all since it was dangerous, even if state of the art. Vargas said there is some case law that says it is waived if not raised as a defense; the issue was debated in the subcommittee.

Sales noted that the statute says "the jury shall consider..." Since defects are compared against other forms of fault, including simple negligence, Sales believes the jury needs to know what the statute says and compare that against the respective fault. DeMahy does not believe that degrees of defect can be considered in the strict liability context. DeMahy does not think there needs to be an instruction because it is factual, not legal. Ingram asked when the statute applies. Vargas read the statute, and it says the jury shall consider the state of the art at the time of manufacture in a design defect case. Ingram observed that the statute says in an action against a manufacturer. DeMahy does not think it applies only to manufacturers, but also to retailers, etc. No one knew of case law on that issue. Wiggins suggested a note that, even though the statute says only

manufacturers, the Committee takes no position on whether it applies to retailers. Vargas is comfortable saying it applies in design defect cases and not specifying which categories of defendants it applies to, pending further case law development.

Baggot noted the statute says “defense” and thus appears to belong in 403.18. The commenters recognized that, but said it is wrong. Hinkle noted it says “defense” in the title only, not the text, which is what matters. Burlington observed that 403.19 says the burden of proof is on the defendant, which makes no sense with this state of the art “defense.” The jury does not make a specific finding on state of the art; it merely considers it with the other evidence. He advocates for moving it to another section of the instructions but thinks it accurately states the statute.

Whitmore observed that this instruction was already preliminarily approved by the Supreme Court. Vargas does not think it is confusing in its current form, but that the Committee can still work on it going forward. **Vargas moved, Ingram seconded, and the Committee decided to leave 403.18(d) in its current form for now and to consider it in the future, just not for the current revisions that need to be submitted shortly.**

l. “Fault” in 403.19

The final comment from the plaintiffs’ attorneys concerned 403.19 (p. 81 of the materials) and its use of “fault” throughout this burden of proof on defense issues instruction, as technically the defendant is liable without fault. The Committee used “fault” in order to tell the jurors how to apportion fault comparatively. The commenters did not believe that plaintiffs have the burden to prove fault, making this instruction unfair. The subcommittee, over Burlington’s objection, decided to leave it in its current form because it is a plain English instruction and there really is no alternative when dealing with apportionment of liability. Hinkle asked if “liability” works. Vargas does not think that is plain English and simple. Russo asked if “responsible” works. Lytal agreed with that. Barton remembers struggling with this issue before and arriving at the conclusion that “fault” works best. Vargas noted that Campo thought this was the best language for jurors and that the Supreme Court already approved it. Sales and Hinkle noted that strict liability is “liability without fault.” **The Committee decided to leave the instruction in its current form, at least for now.**

m. Note on use 1 to 403.7

The defense attorneys commented that the first sentence of note on use 1 to 403.7 (p. 61 of the materials) is not needed 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), are incorrect. Vargas noted the Committee had a heated debate on this issue before. **The subcommittee recommends deleting the sentence and citations, as they were added when manufacturing and design defects were combined, but they are now separate. It also relates to pleading issues and not jury instructions. The Committee agreed.**

n. Note on Use 5 to 403.7

The second comment from the defense attorneys concerned note on use 5 to 403.7 (p. 63 of the materials). They raised issues about inconsistent verdicts and the two-issue rule and requested the Committee put in a new instruction (p. 5 of subcommittee memo):

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

The concern is a line of cases about inconsistent verdict if there is finding of no defect but negligence based on design. When the Committee sent up its original report, it included language (p. 6 of subcommittee memo) to get rid of inconsistent verdict problem:

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.

But the Supreme Court took out the “which results in a product being in an unreasonably dangerous condition” language. So, the subcommittee does not want to put something in this instruction that the Supreme Court has already disapproved.

The commenters also suggested notes on use (pp. 5-6 of subcommittee memo) warning about the potential problems with inconsistent verdicts and the two-issue rule that come from the prior PL instructions:

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 subcommittee recommends putting those back in the current instructions. Barton asked where they should go. **The subcommittee recommends placing the second one listed above, regarding the two-issue rule, at the end of note 3 to 403.7. The subcommittee recommends placing the other suggested note on inconsistent verdicts at the end of note 5 to 403.7.**

Burlington believes the two-issue rule is an appellate or verdict form issue, not a jury instruction issue, so he is not sure a note on use is appropriate here. Sales says it comes up when deciding whether the verdict form should have one question or two, and he thinks the plaintiff has the choice as to what they want to submit and if they end up with a two-issue problem that is of their own making. Vargas stated that the note simply informs practitioners of the cases on this issue. Vargas said this can be considered again in discussing verdict forms and model charges. Ingram asked if there are notes on use for verdict forms. Vargas said there is nothing stopping the Committee from adding notes on use to model verdict forms.

Sales stated that the cases on this issue are all district court of appeal cases and likely decided before the consumer expectation test was adopted. He thinks failure to use reasonable care and distributing a defective product are two separate things; they are not synonymous. Burlington says he always sees plaintiffs going with strict liability and avoiding the problem of a separate negligence question being answered inconsistently, as the remedy is strangely a directed verdict.

Lytal believes the subcommittee's proposal should be adopted. No one disagreed.

o. Strict liability failure to warn – note on use 1 to 403.8

The last comment from the defense attorneys was to add a cite to *Union Carbide Corp. v. Aubin*, 97 So. 3d 886 (Fla. 3d DCA 2012), in note on use 1 to 403.8. The case concerned strict liability failure to warn and tracks the language in the instruction. **The subcommittee agreed with that suggestion. The Committee did not disagree.**

p. Editorial changes

The subcommittee also fixed some typos, which are noted in its report (p. 7 of subcommittee memo):

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 403.18d applies only in...”).

Barton discussed the report that will go up to the Supreme Court and how the Committee's vote should be noted. **Boyer moved, seconded, and the Committee unanimously voted to approve the foregoing changes.** The Committee thanked the products subcommittee for their hard work on this issue, in particular Vargas for her leadership of the subcommittee and her extensive work.

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

MINUTES

Orlando, FL
Orange County Courthouse
July 18, 2013 (1:00 p.m. to 5:00 p.m.)
July 19, 2013 (8:30 a.m. to 12:00 p.m.)

PRODUCTS LIABILITY

Vargas discussed the history that led up to the most recent report submitted on April 15, 2013 regarding the new Products Liability instructions. There were a few issues noted in the report that the Committee is continuing to work on.

Vargas directed the Committee to her memorandum discussing the remaining issues to be addressed concerning the Products Liability instructions (pp. 79-89 of the materials).

q. Instruction 403.7 – Strict Liability

It was noted that the Supreme Court has accepted jurisdiction (Case No. SC12-2075) to review *Union Carbide Corp. v. Aubin*, 97 So. 3d 886 (Fla. 3d DCA 2012). A proposed revision to Note on Use 3 to instruction 403.7 cites *Union Carbide* as Florida law that relies on the Restatement (Third) of Torts to define a product defect. **Burlington was nominated to monitor the *Union Carbide* case before the Supreme Court.** He noted that Larry Stewart and Gary Farmer have filed amicus briefs in the case.

r. Instruction 403.10 – Negligent Failure to Warn

As discussed at the last meeting, comments were received from some Palm Beach County plaintiffs' lawyers that this instruction is confusing and unclear as to post-sale activities and duties. Sales agreed it can be confusing. The Products Liability subcommittee believes the current instruction is correct but suggests adding a new note on use (p. 83 of the materials) about the possible need for a special instruction when the circumstances warrant a post-sale warning instruction:

2. Under certain circumstances, a manufacturer has a duty to warn about particular risks of a product even after the product has left the manufacturer's possession, and has been sold or transferred to a consumer or end-user. See *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259, 1263 (Fla. 1992) (finding 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."); *Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. 3d DCA 2004) (jury question existed on failure to warn claim "in the light of similar severe accidents which occurred both before and after the sale of the pump in question"). A special instruction may be needed in cases raising issues of a post-manufacture or post-sale duty to warn.

Vargas invited discussion. Sales stated that he encountered a judge who did not believe there was a post-sale duty in a products case based on case law in the strict liability

context. He thus thinks the proposed new note is needed. **No one believed there was a need to revise the instruction; the proposed new note should be sufficient.**

s. Instruction 403.13 – Preliminary Issue

It was noted that one part of the Supreme Court’s decision on the Committee’s proposed Products Liability instructions approved instruction 403.13, but another part struck it. It was also noted that there was no discussion about it in the decision, in any of the comments filed to the proposals, or at oral argument.

The aforementioned group of Palm Beach County plaintiffs’ lawyers have expressed concern that the instruction may imply that a defendant must be in a position to correct a defect to be liable. It was noted that this instruction was in response to *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102 (Fla. 4th DCA 2005). The subcommittee suggests deleting the instruction, stating “reserved,” and adding a note on use (p. 84 of the materials) explaining why and referring to note 6 to instruction 403.7, which now discusses whether the defendant was in a position to correct the defect:

1. At this time, the Committee does not propose a standard instruction on preliminary issues in products liability cases. See note on use 6 to instruction 403.7 for cases where there is an issue of whether a defendant was in a position to correct the defect in the product. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla. 1994); *Rivera v. Baby Trend, Inc.*, 914 So.2d 1102 (Fla. 4th DCA 2005); *Porter v. Rosenberg*, 650 So.2d 79 (Fla. 4th DCA 1995).

In addition, the subcommittee suggests a new note on use 2 (p. 84 of the materials) regarding privity, which was in the old PL instructions for a long time and not a source of problems:

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 the 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 and n.4 (Fla. 1988).

The Committee agreed with the subcommittee’s recommendations.

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

The Supreme Court has already approved instruction 403.18d on the state-of-the-art defense (p. 86 of the materials). Section 768.1257, Florida Statutes, creates the state-of-the-art defense, which provides that, in design defect cases, the factfinder must consider whether the product was defectively designed based on the state of knowledge at the time the product was manufactured, not at the time of the plaintiff’s injury. The Palm Beach County plaintiffs’ lawyers commented that this statute does not create a true “defense.” They believe it is more analogous to an evidentiary instruction and should not be listed in

defense-issue instructions, which are generally followed by an instruction (403.19) stating that the defendant wins if the defense is proven.

The subcommittee noted there is no case law providing guidance on this issue. Vargas recalled that this issue was discussed before the initial 2009 report on the new Products Liability instructions, and the Committee decided to put this instruction in the defense instructions. The subcommittee thinks that still makes sense, that the instruction is correct, and that there is no need to change anything.

Burlington observed that the title of the act is not read to the jury, which is the only thing that is really confusing. Sales stated that there is a disconnect between the statute and the instruction. He thinks a consumer's expectation is determined as of the time of the accident, not the time of manufacture, while the risk-benefit test is determined as of the time of manufacture. Sales further noted that the common law already allowed the state-of-the-art argument by the defendant. Sales also stated that judges sometimes put the title of the act in the instructions. Lang noted that the book states the titles should not be read to the jury.

Hinkle asked if the instruction should expressly reference that it applies to a design defect case, not a warning or other type of defect case. Ingram and Vargas think the current note on use covers it. Rosenbloum said he believes the state-of-the-art doctrine also applies in a manufacturing defect case.

Boyer thinks the instruction is ambiguous in beginning with the phrase "in deciding the issues in this case." He believes that implies the instruction applies to all types of defect claims, not just design defects. Boyer thinks there can be a case where different types of defect claims can go to the jury in the same case, which would render the current instruction confusing. Ingram advocated for tweaking the note on use to say the instruction should be modified in such instances to remove any ambiguity. Barton noted instruction 301.5 provides a limited evidence admissibility instruction, which is an approach that could be used here to limit it to the defective design claim. Ingram suggested a bracket in the instruction to account for the contingency of multiple theories of defect. Vargas proposed a bracket along the lines suggested by Ingram, tracking the types of defect in instruction 403.7. Boyer agreed. Burlington thinks there is no need for brackets, just put in design defect and nothing else. Sales agreed. Boyer agreed that could work. **The Committee then developed the following modified proposal for instruction 403.18d:**

"In deciding the issues in this case whether (the product) was defective because of a design defect, 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] or [damage]."

Rosenbloum asked about limiting it to manufacturers, as the statute provides. Vargas thinks that can be argued to the court as to when the statute applies and thus when the instruction should be given. Sales thinks others should be able to argue it, even though the statute says only the manufacturer.

u. Instructions 403.18 and 403.19 – Defense Issues, and Burden of Proof on Defense Issues

Comments from the Palm Beach County plaintiffs' lawyers suggested instruction 403.19 should not use the term "fault" in a strict liability case, as that cause of action does not require a finding of fault. The issue had been debated by the Committee back in 2009, and it was decided that "fault" is a good plain English term. But Whitmore noted that instruction 401.22f, regarding the apportionment of fault defense to a negligence claim, provides "responsible" as an alternative word to use instead of "fault" and that the note on use to 401.22f actually says that "responsibility" may be better in strict liability cases. Also, instruction 501.4, regarding damages, has the same note stating "responsibility" is the term to use in strict liability cases. As a result, the subcommittee recommends adding "responsibility" or "responsible" in brackets next to "negligence" and "at fault" in instruction 403.19 (pp. 88-89 of the materials):

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] [responsibility] 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] [responsible] and that the [negligence] [fault] [responsibility] 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] [responsibility] 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] [responsible] and that the [negligence] [fault] [responsibility] 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] [responsibility] 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] [responsible] and that the [negligence] [fault] [responsibility] 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] [responsibility] of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.]

The subcommittee also recommends adding a second note on use to instruction 403.19 (p. 89 of the materials) that tracks the notes on use to the negligence and damages instructions referenced above:

2. 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.

Another issue the subcommittee noticed was that defense issue instruction 403.18 omits the apportionment of fault defense that is in the corresponding negligence defenses instruction 401.22f. Apportionment of fault clearly applies in a products case. The subcommittee recommends adding that defense as instruction 403.18e with a corresponding note on use (p. 86 of the materials). After some minor revisions, the proposal was as follows:

e. Apportionment of fault:

whether (identify additional person(s) or entit(y) (ies)) [was] [were] also [negligent] [at fault] [responsible] [(specify other type of conduct)]; and, if so, whether that [negligence] [fault] [responsibility] [(specify other type of conduct)] 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 403.18e

See F.S. 768.81; *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.

Vargas proposed filing an amended report with the Supreme Court setting forth the Committee’s changed thinking, without publishing anything since the revisions are based on comments received after publication. Barton stated the norm is to publish, but he was okay with not publishing here given the current changes are clarifications based on

comments received after publication. Barton asked if anyone disagreed and advocated for publication. Vargas also asked if there was a concern about filing an amended report after the Supreme Court may have already started working on the current report. Lang and Jennings thought a full amended report should be filed, but Lang said he would also agree to a smaller, supplemental report if it was deemed appropriate. **Barton will ask Clerk Hall for the Supreme Court's preference – a full amended report, or a supplement.**

Boyer wondered if the term “responsibility” works for a comparative fault defense in a strict liability case. Burlington thinks it may be confusing to tell the jury to apportion between a plaintiff’s fault and a defendant being strictly liable. He thinks responsibility works best to explain it. Boyer noted that “responsibility” is never defined in the instructions, whereas negligence is defined. He noted that the seminal strict liability case, *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), refers to strict liability as “negligence *per se*,” which makes sense to apportion. He thinks “responsibility” needs to be defined. Hinkle does not think it needs a definition. Baggot observed that the notes to the comparative fault statute use the term “responsible persons.” Boyer does not think “responsibility” is the most appropriate term for strict liability, and he would strike the last sentence of the proposed note. Sales thinks some word is needed there to instruct the jury to allocate between these not-like things (fault and liability without fault), and “responsibility” seems the best. Vargas agrees “responsibility” works best. Boyer continued to advocate for eliminating the last sentence of the proposed note. Vargas noted that the language Boyer did not like tracked the language in the current negligence note on use. Vargas also thinks “fault” works, but she believes the negligence and strict liability instructions and notes, as well as the damages instruction, need to be consistent with “responsibility.” **The Committee, with a near unanimous vote, approved the instruction with the term “responsibility” and approved keeping in the sentence in the three respective notes on use stating “responsibility” is the best term for strict liability claims.**

Sales led the Committee in thanking Vargas for her continued hard work on the difficult issues in developing the Products Liability instructions.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

West Palm Beach, FL

Fourth District Court of Appeal

October 24, 2013 (1:00 p.m. to 5:00 p.m.)

October 25, 2013 (8:30 a.m. to 12:00 p.m.)

a. Pending Proposed Instructions

- i. Products Liability – The Committee filed its report in April, a case number has been assigned, and the matter is pending. Vargas noted that an amended report will be filed soon, and the Supreme Court has been so informed.

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

MINUTES

Jacksonville, FL

Duval County Courthouse

February 27, 2014 (1:00 p.m. to 5:00 p.m.)

February 28, 2014 (8:30 a.m. to 12:00 p.m.)

e. Pending Proposed Instructions

Products Liability

The Committee received an Order from the Florida Supreme Court regarding these proposed instructions (pp. 42-43 of the materials). These proposed instructions have a long history. The Committee sent the full report to the Florida Supreme Court in 2009. In 2012, the Court accepted about half of the Committee proposals and then sent the rest back for more work. The Committee submitted the new report in April 2013, and explained to the Court that there were comments from the public that were being considered as possible points of revision. In October 2013, the Court issued an Order asking the Committee to submit a Model Charge and a Special Verdict Form (pp. 42-43 of the materials). The Committee had originally deferred doing so until the Court approved the proposed instructions. Accordingly, the subcommittee has drafted a Model Instruction and a Special Verdict form using the same fact pattern submitted in the original 2009 report. [The Committee's discussion of the subcommittee's draft Model Instruction and Special Verdict form are found in part 5 of the minutes.

PRODUCTS LIABILITY

Vargas gave the report of the subcommittee (pp. 274-87 of the materials). Vargas gave an outline of the history of the revised products instructions, which is also included in the memo prepared by the subcommittee. In 2009, the subcommittee submitted a report to the Florida Supreme Court to reorganize the entire Civil Jury Instructions book and put it into plain English. The Committee also submitted a products liability report. In May 2012, the Court issued a decision on the products report that preliminarily approved several of the products instructions, as revised by the Court. The Court asked the Committee to reconsider several of the products liability instructions, Model Instruction 7 and the Special Verdict Form. In April 2013, the Committee filed its report to the Court on the products instructions (pp. 353-83 of the materials). The report stated that the Committee had deferred consideration of the model charge and special verdict form. The Committee also pointed out that it was still considering several comments from the public regarding the instructions. In October 2013, the Court

issued an order directing the Committee to file an amended report, including model charges and verdict forms (pp. 288-89 of the materials) by April 23, 2014.

The subcommittee drafted a proposed model instruction and special verdict form (pp. 328-39 of the materials). The members met and circulated drafts via email and met by phone several times. Vargas and Russo met with Costello, who is the Chair of the Model Charges subcommittee, to ensure the model charges were consistent with the rest of the model charges in the book. Costello thought that what the subcommittee had put together was consistent.

b. Proposed Model Instruction

The subcommittee started with the same fact scenario included in the original 2009 report (pp. 341-52 of the materials) and updated it based upon the instructions already approved by the Committee (pp. 290-327 of the materials).

On the published version on page 1, the two old model charges 7 & 8 will be removed. This model charge will be the new Model Charge No. 7.

The subcommittee made one change to the facts of the version of the model charge it used. Specifically, there was debate within the subcommittee as to whether an aggravation of injury instruction should be given. Vargas felt the instruction is given in most cases, but some members do not think that it is usually included. To avoid confusion, the subcommittee added in facts that the case involved an aggravation of injury.

There was a question about whether the plaintiff in the model charge was in a car or was a pedestrian at the time of the accident. The facts were changed to make clear that the plaintiff was in a vehicle at the time of the accident.

Rogers asked if the subcommittee had considered adding any additional elements, such as Fabre or risk utility/consumer expectation. Vargas responded no. The subcommittee went with what they said in 2009, which was that it was a consumer expectation test. The subcommittee wanted to give this as an example of a case where only the consumer expectations test applied.

Cohen questioned whether there should be a Note to the model charge indicating that it does not apply in the 3rd DCA, which rejects consumer expectations as an independent test in the case of complex products beyond the understanding of an average consumer. Vargas responded that she did not think so, because the model charge refers back to the main instruction, where the Notes on Use discuss this issue. Rogers suggested adding a specific Note to this model charge referring practitioners back to the main instruction, so they are made aware that there is an issue as to this instruction. Lang suggested putting a note that this fact pattern assumes that this was framed as a consumer expectation test.

It was noted that there is a case at the Florida Supreme Court right now, Aubin v. Union Carbide Corp., SC12-2075, which the Court could use as a platform to decide many of the outstanding issues in this area.

There was a question as to how the model charges and the fact patterns are used in real life. Someone pointed out that in the old book, because there was no product liability negligence charges, it would be helpful to show how the negligence and strict liability work together. Baggot stated that in his experience, people do not really use the model charges. Vargas agreed, noting that within the subcommittee, there were questions about when the model charges were used. Baggot explained that maybe we do not need to be as descriptive in the model charge because we have been very descriptive in the instruction and the note.

The consensus was to add a new Note 1 to the special verdict directing as follows: This fact pattern assumes that the trial judge has ruled that the consumer expectations test should be given. For more explanation of whether the consumer expectations test and/or the risk/benefit test applies, see instructions 403.7 and 403.15.

Rogers asked if there was an issue with referring to “state of the art” as a defense; Vargas said the instruction is consistent with how that issue was resolved by the subcommittee.

Barton questioned whether, on the elements of damages, plaintiffs are asking for the repair cost for their automobile or diminished value. He suggested this language could be removed from the instruction to make it shorter, if parties were not actually seeking these items of damages in practice. Vargas responded that these damages were included in the model charge because they are included in the standard instructions and because the fact pattern indicates that there was property damage.

c. Sample Verdict Form

Ingram pointed out that at page 284, there was an error in the following sentence:

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party **to** influence your decision.

Ingram explained that the emphasized “to” should not be there. It was determined that the error is from the instruction. **As that is not something the Committee can change right now, the Committee decided that would have to be dealt with at a later time.**

Brannock pointed out that hay “baler” is not spelled consistently throughout.

Barton questioned whether different categories of damages should be itemized, rather than having a general verdict on damages. Vargas responded that all of the model verdict forms have just general damages, not itemized. There is a Note that says for a model itemized verdict form, see 2a and 2b. Vargas said that it could be changed but we would want to change all of them. **Barton and Vargas agreed it might be a change best made at a later time when all of the model charges could be changed.**

Vargas explained that the next step is to publish. Procedurally, because the products liability instructions and model charge and verdict have already been published, only the changes need to be published again. **These will be published in the next available Bar News.** Even

if they cannot be published in the March 15 Bar News and they do not get published until April 1, they will be posted on the Florida Bar webpage sooner. If there are comments, the Committee will circulate them via email and vote. The report is due to the Florida Supreme Court on April 23, 2014.

Lang thanked Vargas and the subcommittee for all of their work on this.

Based on the foregoing discussion, the Committee arrived at the following proposal for the products liability model instruction and special verdict form:

~~MODEL CHARGE NO. 7~~

~~MODEL CHARGE NO. 8~~

[NOTE: The full text of the former PL product liability model charges 7 and 8 with special verdict forms will be included and struck through.]

MODEL INSTRUCTION NO. 7

**Product liability case; negligence
and strict liability claims;
comparative negligence defense;
aggravation of pre-existing injury**

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler being driven by Dilbert Driver struck him. The hay baler suddenly swerved across the road into the path of Smith, who was driving in the opposite direction. At the time, Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. 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 retailer seller, Sharp Sales Co., prior to selling it to Driver, had not inspected it. 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. Smith sued Driver, alleging that his operation of the hay baler had been negligent. Smith also sued the manufacturer of the hay bailer, Mishap Manufacturing Co., and the retailer seller, Sharp Sales, alleging that the hay baler had been defectively designed and that both defendants had been negligent in their inspections of the hay bailer. He sought recovery against both the manufacturer and the retailer on claims of (1) negligence and (2) strict liability based on the consumer expectation test. The defendants denied liability, and affirmatively alleged that Smith had been comparatively negligent. There are also issues of a pre-existing injury.

The court's instruction:

The committee assumes that the court will give these instructions as part of the instruction at the beginning of the case and that these instructions will be given again before Final Argument. When given at the beginning of the case, 202.1 will be used in lieu of 403.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of an instruction at the beginning of the case.

[403.1] 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 the same as 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.

[403.2] The claims and defenses in this case are as follows. John Smith claims that Dilbert Driver was negligent in operation of the hay baler he was driving which caused him harm. John Smith also claims that Mishap Manufacturing Company, the manufacturer of the hay baler, and Sharp Sales Company, the seller of the hay baler, were negligent — Mishap in designing and inspecting the hay baler, and Sharp in the manner it inspected it before sale — which caused him to be injured by the hay baler. Finally, John Smith also claims that the hay baler designed and manufactured by Mishap and sold by Sharp was defective and that the defect in the hay baler caused him harm.

All three defendants deny these claims and also claim that John Smith was himself negligent in the operation of his vehicle, which caused his harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

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

[401.4 and 403.9] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. In the case of a designer, manufacturer or seller of a product, it is the care that a reasonably

careful designer, manufacturer or seller would use under like circumstances. Negligence is doing something that a reasonably careful person, designer, manufacturer or seller would not do under like circumstances or failing to do something that a reasonably careful person, designer, manufacturer or seller would do under like circumstances.

[403.7b] A product is defective because of a design defect 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.

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.

[401.12a and 403.12a] Negligence or a defect in a product 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 or defect, the loss, injury or damage would not have occurred.

[401.12b and 403.12b] 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 in a product may be a legal cause of loss, injury or damage even though it operates in combination with the act of another or some other cause if the negligence or defect contributes substantially to producing such loss, injury or damage.

[401.18a] The issues you must decide on John Smith's claim against Dilbert Driver are whether Dilbert Driver was negligent in his operation of the hay baler, and, if so, whether that negligence was a legal cause of the loss, injury or damage to John Smith.

[403.15f] The issues you must decide on John Smith's claim of negligence on the part of Mishap Manufacturing Company, the manufacturer of the hay baler, is whether Mishap Manufacturing Company was negligent in the design of the hay baler or in its inspection of the hay baler after it was built, and, if so, whether that negligence was a legal cause of the loss, injury or damage to John Smith.

The issues you must decide on John Smith's claim of negligence on the part of Sharp Sales Company, the seller of the hay baler, are whether Sharp Sales Company was negligent in failing to inspect the hay baler before selling it to John

Smith, and, if so, whether that *negligence* was a legal cause of the loss, injury or damage to John Smith.

[403.15e] The issues you must decide on John Smith's claims of defect in the hay baler against Mishap Manufacturing Company, the manufacturer of the hay baler, and Sharp Sales Company, the seller of the hay baler are whether the hay baler 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 hay baler reached Dilbert Driver without substantial change affecting the condition and, if so, whether that failure was a legal cause of the loss, injury or damage to John Smith.

[403.17] If the greater weight of the evidence does not support one or more of John Smith's claims then your verdict should be for Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company.

[403.18a] If, however, the greater weight of the evidence supports one or more of John Smith's claims *against one or more of the defendants*, then you shall consider the defenses raised by those defendants.

On the first defense, the issue for you to decide is whether John Smith was himself negligent in driving and, if so, whether that negligence was a contributing legal cause of the injury or damage to John Smith.

2. [403.18D] ON THE SECOND DEFENSE, IN DECIDING WHETHER THE HAY BALER WAS DEFECTIVE BECAUSE OF A DESIGN DEFECT, YOU SHALL CONSIDER THE STATE-OF-THE-ART OF SCIENTIFIC AND TECHNICAL KNOWLEDGE AND OTHER CIRCUMSTANCES THAT EXISTED AT THE TIME OF THE HAY BALER'S MANUFACTURE, NOT AT THE TIME OF THE LOSS, INJURY OR DAMAGE.

[403.19] If the greater weight of the evidence does not support the defenses of Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company, and the greater weight of the evidence supports one or more of John Smith's claims, then you should decide and write on the verdict form what percentage of the total negligence or responsibility of all defendants was caused by each defendant.

If, however, the greater weight of the evidence shows that both John Smith and one or more of the defendants were negligent or responsible and that the negligence or responsibility of each contributed as a legal cause of loss, injury or damage sustained by John Smith, you should decide and write on the verdict form what

percentage of the total negligence or responsibility of all parties to this action was caused by each of them.

[501.1b] If your verdict is for Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company, you will not consider the matter of damages. But if the greater weight of the evidence supports one or more of John Smith's claims, you should determine and write on the verdict form, in dollars, the total amount of loss, injury or damage which the greater weight of the evidence shows will fairly and adequately compensate him for his loss, injury or damage, including any damages that John Smith is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2a] Any bodily injury sustained by John 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.

[501.2b] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by John Smith in the past or to be so obtained in the future.

[501.2c] Any earnings lost in the past and any loss of ability to earn money in the future.

[501.2h] Any damage to John Smith's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair.

You shall also take into consideration any loss to John Smith for towing or storage charges and by being deprived of the use of his automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of John Smith. The court will enter a judgment based on your verdict and, if you find that John 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 was caused by John Smith.

The court will also take into account, in entering judgment against any defendant whom you find to have been negligent or responsible, the percentage of that defendant's negligence or responsibility compared to the total negligence or responsibility of all the parties to this action.

[501.5a] If you find that one or more of the defendants caused a bodily injury, and that the injury resulted in an aggravation of an existing disease or physical defect or activation of a latent disease or physical defect, you should attempt to decide what portion of John Smith's condition resulted from the aggravation or activation. If you can make that determination, then you should award only those damages resulting from the aggravation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by John Smith.

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

[501.7] 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 John Smith for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

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

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give 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.

[601.2b] 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.

[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against Dilbert Driver. The second is the negligence claims against Mishap Manufacturing Company and Sharp Sales Company. The third is the product defect claims against Mishap Manufacturing Company and Sharp Sales Company. Although these 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.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

Following Closing Arguments, the final instructions are given:

[700] Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing

arguments of the attorneys. You will shortly retire to the jury room to decide this case. Before you do so, I have a few last instructions for you.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must

consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the verdict form to you: (read form of verdict)

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. When you have finished filling out the form, your foreperson must write the date and sign it at the bottom and return the verdict to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict.

Special Verdict Form

VERDICT

We, the jury, return the following verdict:

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

YES NO

2a. Was there negligence on the part of defendant Mishap Manufacturing Co. which was a legal cause of damage to plaintiff, John Smith?

YES NO

2b. 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

3a. Was there negligence on the part of defendant Sharp Sales Co. which was a legal cause of damage to plaintiff, John Smith?

YES NO

3b. 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

If your answers to questions 1-3 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 you answered YES to any of Questions 1-3, 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, John Smith's, damages that you charge to:

Defendant Dilbert Driver (fill in only if you answered YES to question 1) _____ %

Defendant Mishap Manufacturing Co.

(fill in only if you answered YES to question 2a and/or question 2b) _____ %

Defendant Sharp Sales Co. (fill in only if you answered YES to question 3a and/or question 3b) _____ %

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

Total 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 John Smith.

SO SAY WE ALL, this day of _____, 20 ____.

FOREPERSON

NOTES ON USE

1. This fact pattern assumes that the trial judge has ruled that the consumer expectations test should be given, For more explanation of whether the consumer expectations

test and/or the risk/benefit test applies, see the notes on use to instructions 403.7 and 403.15.

2. For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Forms 2(a) and 2(b).