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PRATHER • KEEN & LITTKY-RUBIN
TRIAL & APPELLATE ATTORNEYS

Direct Dial: (561) 899-2109
E-Mail: jlittkyrubin@clarkfountain.com
dfountain@clarkfountain.com
hkeen@clarkfountain.com

September 28, 2016

Via Email to rvargas@kwcvpa.com
Ms. Rebecca Mercier Vargas
Kreusler-Walsh, Compiani & Vargas, P.A.
501 S. Flagler Dr.
Suite 503
West Palm Beach, FL 33401-5913

Re: Comments on Proposed Amendments to Jury Instructions in Product Liability Cases, Published in the Florida Bar News, September 1, 2016

Dear Ms. Mercier Vargas:

Please accept these comments and analysis regarding the proposed amendments to the Committee's most recent proposed product liability jury instructions.

We commend and thank the committee for its never-ending willingness to have the standard jury instructions keep pace with ever-evolving Florida law. The original amendments to the instructions as drafted by the committee have been helpful in guiding litigants and the courts, and there is no doubt that these newest amendments will continue to streamline and assist in clarifying the law, as it applies to cases involving alleged product defects.

In reviewing the most recent amendments to the jury instructions as published in the Florida Bar News on September 1, 2016, we have five over-arching concerns:

1. That despite the Florida Supreme Court's clear adoption of the consumer expectations test, it is not clear that consumer expectations is Florida's governing legal standard; and we fear that retaining any remnants of "risk utility" will create confusion and inconsistency;

2. That the cause of action for "failure to warn" in a product liability defect claim is not clearly spelled out by the instructions, though it is a viable and often used cause of action;

3. That what it means for a product to suffer from "substantial change" is not clear in the instructions, which paves the way for defendants to convince trial judges and juries that it is something it is not;

1919 N. Flagler Drive, 2nd Floor ● West Palm Beach, FL 33407
(561) 899-2100 ● Facsimile (561) 832-3580 ● (866) 643-3318 ●www.clarkfountain.com

4. That the instructions continue to suggest that evidentiary presumptions conferred on manufacturers for compliance with government rules and the "state of the art," somehow amount to actual legal "defenses," and the Committee should make clear that they do not absolve entities from liability; and

5. That while the model instructions provided are helpful in the limited areas they cover, they should—respectfully--be more comprehensive and include more scenarios so that litigants may be able to truly use them in litigating product defect cases.

We set forth the bases for these concerns in detail below.

1. The instructions should more fully embrace the "consumer expectations" test which the Supreme Court has made clear is the appropriate governing legal standard in Florida.

As the Committee of course knows, in deciding *Aubin v. Union Carbide Corp.*, 177 So.3d 489 (Fla. 2015), the Florida Supreme Court explicitly rejected the "risk utility" test for design defect claims in Florida, and instead solely embraced the "consumer expectations" test. *Id*. at 510. In doing so, the Court observed that the Third Restatement's approach was not only "inconsistent with the rationale behind the adoption of strict products liability," but is also "contrary to this state's prior precedent." *Id*.

In explaining its rationale, the supreme court noted that the important aspect of strict products liability that led to its adoption of the doctrine in *West* in the first place is still true: *i.e.*, that the burden of compensating victims injured by unreasonably dangerous products is placed on the manufacturers, who are most able to protect against the risk of harm, and not on the consumer injured by the product. *Id*.

Notably, *Aubin* did **not** involve a manufacturing defect (plaintiff's claims in that case were for negligent and strict liability defective design, and failure to warn). *Id*. at 493. Thus, *Aubin* never explicitly addressed defective manufacturing claims.

Still, the rationale which underlies *West*, and which the supreme court essentially readopted in *Aubin*, applies to **all** unreasonably dangerous products. Thus, whether the manufacturer ***designed*** the product defectively, or whether it ***manufactured*** it defectively (or failed to warn properly for that matter), the case should be uniformly governed by the same "consumer expectations" test articulated by the Florida Supreme Court.

As it stands, there are two different tests articulated for defective design cases versus defective manufacturing cases. The instructions apprise jurors that the consumer expectations test will apply if a product is unreasonably dangerous due to a *design defect*, but if a product is unreasonably dangerous because of something in the manufacturing process, the instructions advise the jury that it should consider if "it is different from its intended design and fails to perform as safely as the intended design would have performed."

While a design defect case is examined from the perspective of the consumer, the current instructions suggest that a manufacturing defect is evaluated from the point of view of the manufacturer.

However, there do not seem to be any cases or practical considerations which justify such divergent viewpoints. Certainly, focusing on the manufacturer's safety intent is contrary to the Court's directive that the defect determination should focus on the expectation the manufacturer creates which prompts the consumer to purchase the product. The Supreme Court noted the potential for jury confusion and inconsistent verdicts in *Coba v. Tricam Indus., Inc.*, 164 So.3d 637 (Fla. 2015).

We submit that 403.7 on strict liability should articulate the same test whether the subject defect alleged is one of manufacturing, one of design, or one of warnings. We submit that streamlining 403.7 to include a letter "c" and using the same consumer expectations test for all types of defects--manufacturing, design and warnings--would conform with the law more clearly, and certainly would be much less confusing for the jury. We also submit that these internally inconsistent tests in the instructions will lead to inconsistent verdicts, and a misapplication of the law.

On a final note, we suggest that the committee should remove all references to the "risk benefit" test from the instructions all together. In light of the Supreme Court's clear rejection of the "categorical adoption of the Third Restatement and its reasonable alternative design requirement," it would seem that having this test in alternative language and these instructions would only serve to confuse the jury as well as trial judges and litigants, and could misapply the law.

2. Because strict liability applies to defective warnings, the instructions should more squarely address warnings claims.

For some reason, 403.7 does not articulate an instruction applicable to a defect in warnings even though instruction 403.15(f) (on identifying claims) does address them.

Because Florida law now more formally recognizes strict liability warnings claims, we feel it is important for the Committee to address and clarify the instructions as applied to this fairly common kind of strict liability claim.

We also believe that but for requiring fault, the "Strict Liability Failure to Warn" and "Negligent Failure to Warn" instructions should use the same language.

Now, while 403.15(f) includes "warnings and instructions" language, 403.15(h) does not. We submit that both 403.15(f) and (h) should contain the language "whether the foreseeable risks of harm could have been reduced or avoided by providing reasonable instructions or warnings."

3. The Substantial Change Doctrine should be clarified.

Unfortunately, what amounts to "substantial change" is not really defined in the instructions. We propose a note to 403.7 that apprises jurors that "the normal expected or foreseeable use of a product does not constitute a **substantial change.**"

In actual litigated cases we have handled, defendants have posited that the use of a product--even in the manner intended and foreseeable--substantially changes the product from its as manufactured condition, and therefore no liability can attach.

For example, when a tire separates after two years of use has a lower tread depth than it did when the tire was newly manufactured, such a foreseeable change seems to allow defendants to claim that the worn tread depth amounts to a "substantial" change since the time of manufacture. As another example, when an air bag control module fails to deploy the airbag in an accident, Defendants will assert that because it has been subjected to humidity or high ambient temperatures in south Florida, somehow that, too, is a "substantial" change to the product. Clearly, those "extra-legal" assertions are not what the instructions intended, and we would ask the Committee to consider some clarification.

4. *The mere compliance with "government rules" or the "state of the art" does not amount to legal* ***defenses****, and the instructions should not suggest that compliance with these evidentiary presumptions would absolve the defendant entities from responsibility.*

While the Florida Legislature did use the term "defense" in section 768.1256 (government rules *"defense"*) and section 768.1257 (state of the art *"defense"*), a review of these sections demonstrates that they are simply matters of evidence, and not actual bases for providing a **defense** to manufacturers, retailers and other entities in the chain of distribution.

The word "defense" necessarily implies an "affirmative" defense, which ultimately could amount to an absolution of the defendant. *See*, *e.g.*, *Wausau Ins. Co. v. Haynes*, 683 So.2d 1123, 1124 (Fla. 4th DCA 1996) (noting that in ruling on a motion to dismiss, courts must confine themselves to allegations in the complaint and may not consider affirmative defenses "which might absolve the defendant of liability at a motion for summary judgment or at trial.")

As evidenced by the notes to 403.18(c), the committee specifically chose not to create a "government rules defense" instruction. Whatever reasoning went into making that determination, we submit that the committee should follow the same reasoning with respect to the purported "state of the art" defense.

Respectfully, there is no law that supports a "state of the art" defense in Florida. Simply because the jury may determine that a product meets the state of the art does not amount to a basis for reaching a verdict for the defendant, or to suggest that the verdict for the plaintiff should be lessened or reduced in some way.

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

Rather importantly, a product can still be defective even if it was indeed "state of the art."

Elevating mere timing to the status of an actual "defense" is misleading and will cause tremendous confusion and a misapplication of law that does not exist. Certainly, defendants will want to include "state of the art" as a separate question on the verdict form, and will likely lead

to attorneys filing motions for summary judgment and directed verdicts, asserting that compliance with "state of the art" absolves them from responsibility.

Our suggestion is that **the word "defense" be removed from any reference to "state of the art"** and that "state of the art" (as well as government rules) be removed from the "defense issues" section of the instructions.

We believe these evidentiary instructions are best left out entirely from the jury instructions, or at the very least, taken from the section classified as "defense issues." Perhaps, the Committee would want to include them in a new section that either discusses inferences or other issues.

We believe that it is very important that the committee make **clear** that government rules and compliance with "state of the art" are not affirmative defenses or somehow "defense issues," that allow defendants to absolve themselves from responsibility.

5. *Suggested additions to the Model Instruction No. 7 and Verdict Form to encompass more claims and to give courts and litigants more guidance.*

MODEL INSTRUCTION NO. 7
Modified in Bold and Red

Strict product liability and negligence case; with aggravation of pre-existing injury; and comparative negligence defense

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler **being driven on the highway** by Dilbert Driver struck **his car**. 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.

At the time of the accident, Dilbert Driver was operating the hay baler at an unsafe speed when **a** bolt **that was part of the steering mechanism** suddenly broke, making it impossible for Dilbert Driver to steer the hay baler, which crashed into the car being driven by John Smith and injured him as a result.

An examination of the hay baler **after the crash** revealed that **the** bolt **had been** designed **and manufactured** in such a way that it could not sustain the speed of highway driving, would loosen over time, weaken, and eventually break. **The hay baler contained no warnings or instructions concerning highway use or inspection or maintenance of the bolt. Further, no warnings or instructions concerning highway use or inspection or maintenance of the bolt were provided at the time of sale.**

The retail seller **of the hay bailer**, Sharp Sales Co., prior to selling it to Driver, had not inspected it. There was evidence that a person could have observed the weakened condition of the steering mechanism **bolt at the time of sale and also prior to the crash** had he or she examined it.

Smith sued Driver, alleging that his operation of the hay baler had been negligent **and that he was negligent for failing to inspect, maintain and replace the bolt**.

Smith also sued the manufacturer of the hay baler **and the bolt,** Mishap Manufacturing Co., alleging that the hay baler **and the bolt** had been defectively designed**, defectively manufactured, had insufficient and defective warnings and instructions,** and that **the** defendant had been negligent in **its design, manufacture, warnings and instructions, and its pre-sale** inspection of the hay baler **and the bolt**. Smith sought recovery against the manufacturer on claims of (1) negligence and (2) strict liability.

Finally, Smith sued the retailer seller, Sharp Sales, alleging under the chain of distribution doctrine that the hay baler and the bolt had been defectively designed, defectively manufactured, had insufficient and defective warnings and instructions, and that the defendant had been negligent in its warnings and instructions and its pre-sale inspection of the hay baler and the bolt. Smith sought recovery against the retailer seller on claims of (1) negligence and (2) strict liability.

All defendants denied liability and affirmatively alleged that John Smith had been comparatively negligent. The defendants also alleged a pre-existing injury and that some of John Smith's injuries pre-existed the collision with the hay baler. John Smith alleged that his pre-existing condition was aggravated by the collision with the hay baler.

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 given 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 the operation, **maintenance and inspection** of the hay baler **and the bolt** which caused him harm.

John Smith also claims that Mishap Manufacturing Company, the manufacturer of the hay baler and the bolt, was negligent in designing, manufacturing, and providing warnings and instructions concerning the hay baler and the bolt, and was also negligent in the manner it inspected the hay baler and the bolt before sale which caused him to be injured by the hay baler.

John Smith also claims that Sharp Sales, the retailer seller of the hay baler and the bolt, was negligent in providing warnings and instructions concerning the hay baler and the

bolt, and was also negligent in the manner it inspected the hay baler and the bolt before sale which caused him to be injured by the hay baler.

Finally, John Smith also claims that the hay baler and the bolt designed and manufactured by Mishap and sold by Sharp was defective in design, had been defectively manufactured, had insufficient and defective warnings and instruction, and that the defects in the hay baler and the bolt 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, seller, importer, distributor, or supplier of a product, it is the care that a reasonably careful designer, manufacturer, seller, importer, distributor, or supplier would use under like circumstances. Negligence is doing something that a reasonably careful designer, manufacturer, seller, importer, distributor, or supplier would not do under like circumstances or failing to do something that a reasonably careful person, designer, manufacturer, seller, importer, distributor, or supplier would do under like circumstances.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[403.7b] A product is defective because of a design defect**, a manufacturing defect, or a warnings and instructions defect** if it is in a condition unreasonably dangerous to the user or 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.

A product is defective because of its manufacture if it is different from its intended design and 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.

A product is defective because of its warnings or instructions if the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable warnings or instructions and 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**, maintenance and inspection** of the hay baler **and the bolt,** and, if so, whether that negligence was a legal cause of the loss, injury, or damage to John Smith.

[403.15g] The issues you must decide on John Smith's claim of negligence on the part of Mishap Manufacturing Company, the **designer and** manufacturer of the hay baler **and the bolt,** is whether Mishap Manufacturing Company was negligent in the design**, manufacture, or providing warnings and instructions regarding** the hay baler **or the bolt,** or in its inspection of the hay baler **or the bolt** 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 **and the bolt,** are whether Sharp Sales Company was negligent in **providing warnings and instructions regarding** the hay baler **or the bolt,** or in its inspection of the hay baler **or the bolt** 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 **and the bolt** against Mishap Manufacturing Company, the manufacturer of the hay baler **and the bolt,** and Sharp Sales Company, the seller of the hay baler **and the bolt,** are whether the hay baler **and the bolt** 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, **and the bolt** 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.

[403.18d] In deciding whether the hay baler **and the bolt were** 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, fault, 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)]

[You will be given (state number) forms of verdict, which I shall now read to you: (read form of verdict(s))]

[If you find for (claimant(s)), your verdict will be in the following form: (read form of verdict)]

[If you find for (defendant(s)), your verdict will be in the following form: (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 defendants Mishap Manufacturing Co. and Sharp Sales Co. place the hay baler **or the bolt** on the market with a defect which was a legal cause of damage to plaintiff, John Smith?

YES _____ **NO** _____

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

YES _____ **NO**_____

If your answers to questions 1**, 2a, 2b, and 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**, 2a, 2b, or 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. and Sharp Sales 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 2b and/or question 3) _____%

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

We hope that the Committee will consider some of our suggestions, and thank you all for your time and care in doing this important work. If you would like a copy of this to be sent to you in Microsoft Word, please let us know and we will be happy to oblige.

Respectfully submitted,

Julie H. Littky-Rubin
Donald R. Fountain
W. Hampton Keen

JHL-R:smr

Cc: htelfer@floridabar.org
sjicivil@flcourts.org