IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES–REPORT NO. 19-03 **NO. SC19-**

REPORT NO. 19–03 OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases files this report and recommends that this Court approve the proposed amendments to Instructions 403.7 — Strict Liability, 403.8 — Strict Liability Failure to Warn, 403.15 — Issues on Main Claim, 403.17 — Burden of Proof on Main Claim, 403.18 — Defense Issues, 403.19 — Burden of Proof on Defense Issues, and Model Instruction Number 7 as set forth in Appendix A to this report. This report is filed pursuant to article V, section 2(a), of the Florida Constitution.

INTRODUCTION

The Committee proposes amendments to Florida Standard Jury Instructions in Civil Cases, Section 403 — Products Liability to address several decisions of this Court. The Committee considered these instructions in three stages.

First, the Committee considered *Coba v. Tricam Industrial, Inc*., 164 So. 3d 637, 648 n.2 (Fla. 2015), which discusses whether an inconsistent verdict in a products liability case constitutes fundamental error. The Committee voted to amend Note on Use 5 to Instruction 403.7 — Strict Liability, in response to *Coba*. (*See* Appendix D–2-D–4.) The Committee published this proposed amendment for comment in The Florida Bar *News* on August 15, 2015. (*See* Appendix B–2-B–4.) No comments were received.

Second, the Committee considered the decision in *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015). In *Aubin,* this Court "adhere[d] to the consumer expectations test, as set forth in the [RESTATEMENT (SECOND) OF TORTS], and reject[ed] the categorical adoption of the [RESTATEMENT (THIRD) OF TORTS] and its reasonable alternative design requirement." *Id.* at 510. This Court concluded that "the plaintiff is not required, but is permitted, to demonstrate the feasibility of an alternative safer design and that the defendant may present evidence that no

reasonable alternative design existed, while also arguing in defense that the benefit of the product's design outweighed any risks of injury or death caused by the design." *Id.* at 511. The Court observed that the Standard Jury Instructions in Civil Cases "use both the consumer expectations test and risk utility test as alternative definitions of design defect." *Id.* at 512. This Court did "not direct, at this point, whether the standard jury instructions should be modified in this opinion." *Id.*

In response to *Aubin,* the Committee voted to amend Instructions 403.7 — Strict Liability, 403.15 — Issues on Main Claim, 403.18 — Defense Issues, and Model Instruction Number 7. The Committee published these amendments for comment in The Florida Bar *News* on September 1, 2016. (*See* Appendix B–5-B–21.) The Committee received two comments from the public. (*See* Appendix E–2-E–18.) William C. Ourand, Julie H. Littky-Rubin, Donald R. Fountain, and W. Hampton Keen submitted comments in response to the September 2016 notice. (*See* Appendix E–2-E–18.) Mr. Ourand shared concerns with the proposed defense instruction on "unavoidably unsafe products." Ms. Littky-Rubin, Mr. Fountain, and Mr. Keen raised concerns that the proposal: would cause confusion and inconsistency by retaining remnants of the "risk utility" test; does not spell out a cause of action for "failure to warn"; confuses legal defense with evidentiary presumptions; and does not cover enough scenarios to be helpful.

In the third stage, the Committee proposed amendments to make the products liability instructions on burden of proof consistent with amendments this Court recently approved. *In re: Standard Jury Instructions in Civil Cases—Report No. 17-03*, 236 So. 3d 919 (Fla. 2018) (SC17-1060). To make the products liability instructions consistent, the Committee amended Instructions 403.17 — Burden of Proof on Main Claim and 403.19 — Burden of Proof on Defense Issues, and Model Instruction Number 7. The Committee published these amendments for comment in The Florida Bar *News* on May 15, 2018. (*See* Appendix B–22-B–28.) In addition, the Committee republished the proposed amendment to 403.18 — Defense Issues. This proposed amendment substituted a comment k instruction for the existing "Risk/Benefit Defense." (*See* Appendix B–23-B–26.) The previous publication on September 1, 2016, inadvertently failed to include an amendment creating an instruction on the learned intermediary defense in failure to warn cases. (*See* Appendix B–9-B–10.)

In response, the Committee received twenty-one comments, most of which concerned comment k from the RESTATEMENT (SECOND) OF TORTS § 402a. (*See* Appendix E–19-E–73.) Comment k concerns unavoidably unsafe products. The twenty-one comments opposed the published proposal. The comments raised concerns that the proposal: did not fully encompass the elements of the comment k

defense; would cause confusion; limits state-of-the-art defense; did not fully account for the statutory standard state-of-the-art defense in section 768.1257, Florida Statutes; creates an unnecessary and unfair burden on Florida consumers and Florida plaintiffs; and is inconsistent with Florida law. In light of the comments, the Committee decided to remove the language involving comment k, as it created such controversy and the circumstances in which it would apply are infrequent. The proposed Note on Use 6 to Instructions 403.18 explains the Committee's decision to not include a comment k instruction.

THE PROPOSED AMENDMENTS

403.7 STRICT LIABILITY

Current Instruction 403.7b defines a design defect as when 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] [and] [or] [the risk of danger in the design outweighs the benefits]." The products liability subcommittee was divided regarding whether *Aubin* completely eliminated the risk/benefit test or made it an alternative test to establish a design defect.

The Committee discussed this during its meeting in February 2016. (*See* Appendix D–5-D–10.) The Committee decided to delete the word "[and]" between the consumer expectations and risk/benefit test. This is intended to reflect that the plaintiff may choose to prove the product's defectiveness through the risk/benefit test, but is not required to do so. (*See* Appendix D–5-D–6.)

In response to this Court's decision in *Coba v. Tricam Industrial, Inc.*, 164 So. 3d 637, 648 n.2 (Fla. 2015), the Committee revised Note on Use 5 (now renumbered as Note on Use 3) to add a citation to *Coba*. The Committee removed the citation to *North American Catamaran Racing Ass'n v. McCollister*, 480 So. 2d 669 (Fla. 5th DCA 1985), which this Court disapproved in *Coba*.

After publication, the Committee added language to 403.7b regarding the state-of-the-art defense in response to a comment from three attorneys, Julie H. Littky-Rubin, Donald R. Fountain, and W. Hampton Keen of the firm Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin. These attorneys commented that section 768.1257, Florida Statutes, titled "State-of-the-art defense for products liability" does not create a true affirmative defense. Instead, this statute governs the evidence admissible on liability. Section 768.1257, Florida Statutes, requires the finder of fact determining design defect to "consider the state of the art of scientific

and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury." These attorneys commented that the Committee should delete Instruction 403.18d.

The Committee agreed with this comment that the statute does not create a true defense that absolves a defendant of liability if proven. Instead, section 768.1257, Florida Statutes, governs the evidence that the jury may consider when determining design defect. To clarify this, the Committee deleted Instruction 403.18d. The Committee added the following language to the definition of design defect in 403.7b:

> **[In deciding 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] [injury] [or] [damage].]**

The Committee revised the Notes on Use to direct readers to *Aubin* regarding when the jury should be instructed on the consumer expectations or risk/benefit test. The Committee renumbered the remaining Notes on Use. As revised, Note on Use 1 explains:

> Consumer expectations test; risk/benefit test. See *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 512 (Fla. 2015) (Consumer expectations test and risk/benefit test are alternative definitions of design defect); *R.J. Reynolds v. Larkin*, 225 So. 3d 886 (Fla. 3d DCA 2017); *Font v. Union Carbide Corp.*, 199 So. 3d 323 (Fla. 3d DCA 2016).

The Committee proposes a new Note on Use to refer the reader to section 768.1257, Florida Statutes, for the state-of-the-art defense.

403.8 STRICT LIABILITY FAILURE TO WARN

The Committee deleted the first Note on Use to instruction 403.8 — Strict Liability Failure to Warn. The note had merely listed cases that had recognized a strict liability failure to warn claim. The note was incorrect insofar as it cited to the Third District's decision in *Aubin*, which this Court had reversed. 177 So. 3d at 489. A string citation to cases predating this Court's *Aubin* decision seemed unnecessary. The Committee did not publish this revision for public comment. In

the opinion of the Committee, this editorial correction to the citation is not a substantive change.

403.15 ISSUES ON MAIN CLAIM

In response to *Aubin*, the Committee amended the definition of design defect in Instruction 403.15e to delete the word "[and]" between the consumer expectations and risk/benefit test. This is consistent with the amendment to instruction 403.7b. This amendment is intended to reflect that the plaintiff may choose to prove the design defective through the risk/benefit test, but is not required to do so. The Committee also deleted the Note on Use explaining the consumer expectations and risk/benefit test. The Committee feels this Note on Use is longer necessary.

403.17 BURDEN OF PROOF ON MAIN CLAIM

These amendments revise the jury instructions on apportionment of fault that are currently inconsistent with the jury instructions on legal causation and comparative fault. The current language in the jury instructions describes the apportionment of comparative fault as requiring the jury to determine what percentage of the "total negligence" of the parties to the action was "caused" by each of them. Yet, the standard jury instructions define legal causation in relation to damages, not negligence, fault, or responsibility. The Committee also agreed that the current comparative fault instructions are confusing because it is unclear how a person/entity can "cause" negligence, fault, or responsibility. The Committee further noted that the existing instruction may also be inconsistent with the case law, which was found by the Committee to be inconsistent regarding whether the criteria for apportioning comparative fault is blameworthiness, whether it is the causation of loss, or whether it is the percentage of the plaintiff's damages which were caused by each party's negligence. The majority of the Committee agreed that the comparative fault jury instructions should be changed to be consistent with the legal cause instructions, and thus should reflect that when deciding comparative fault, the jury should resolve a defendant's percentage of fault in causing an injury. Accordingly, the amended instructions ask the jury to decide the percentage of the total negligence the jury "apportion[s]" to each party.

The Court recently approved similar changes to 401.21 (Burden of Proof on Main Claim), 401.23 (Burden of Proof on Defense Issues), 402.13 (Burden of Proof on Main Claim), 402.15 (Burden of Proof on Defense Issues), 409.12 (Burden of Proof on Defense Issues), 412.8 (Issues on Claim and Burden of Proof).

See In Re: Standard Jury Instructions in Civil Cases—Report No. 17-03, SC17-1060, 2018 WL 2168867 (Fla. Feb. 1, 2018).

403.18 DEFENSE ISSUES

The Committee proposes deleting the Risk/Benefit Defense as it currently exists in Instruction 403.18b. The Committee also proposes deleting 403.18c "Government Rules Defense" and 403.18d "State-of-the-art Defense." Existing subdivision e, Apportionment of Fault, would be renumbered as 403.18b. As discussed above, the Committee agreed with a comment by Julie Littky-Rubin that the state-of-the-art "defense" was not an affirmative defense. The Committee also agreed with Julie Littky-Rubin that there was no government rules defense, but instead, section 768.1256, Florida Statutes, creates a presumption. Whether this presumption is burden-shifting or vanishing is uncertain. Thus, the Committee offers no standard instruction on the presumption, but it offers Note on Use 4.

The Committee proposes a new Instruction, at new subdivision c, on the learned intermediary defense to failure to warn claims for products supplied through an intermediary. This instruction is based on guidance supplied by this Court in *Aubin* that clarified prior conflicting case law from the district courts of appeal. 177 So. 3d at 514-16. The Committee also proposes Note on Use 4 to clarify that factors listed in the instruction are not exhaustive.

The Committee proposes Note on Use 3 to clarify that, for an apportionment of fault, the term "negligence" is appropriate in most cases, but other terms may be appropriate for another type of fault is at issue (like strict liability).

403.19 BURDEN OF PROOF ON DEFENSE ISSUES

These amendments revise the jury instructions on apportionment of fault that are currently inconsistent with the jury instructions on legal causation and comparative fault. The reasons for these revisions are the same as the reasons for the revisions to Instruction 403.17 — Burden of Proof on Main Claim, stated above. Thus, the comments above for Instruction 403.17 are incorporated by reference for Instruction 403.19.

MODEL INSTRUCTION NO. 7

The Committee proposes changes to the hypothetical of Model Instruction Number 7. The changes make Model Instruction Number 7 consistent with the proposed changes in the instructions, and they are intended to simplify the

instruction. The Committee proposes deleting existing Note on Use 1 to remove the "consumer expectation test" and "risk/benefit test" from the Note on Use.

The Committee proposes errors and omissions amendments removing language in bold italic and to conform the model instruction with the language of the respective instructions. The Committee proposes deleting the "final instructions" in each model instruction and instead refer the reader to Model Instruction Number 1 as an example of an entire set of instructions. Names in bold and all capital letters are amended to appear in just bold.

COMMENTS RECEIVED

The Committee received no comments in response to the publication on August 15, 2015, in The Florida Bar *News* of the proposed amendment to 403.7, note 5. (*See* Appendix B–2-B–4.)

The Committee received two comments in response to the publication of the proposed products liability instructions on September 1, 2016, in The Florida Bar *News*. (*See* Appendix B–5-B–21.)

The Committee received twenty-one comments in response to the May 15, 2018, publication notice: Linda A. Alley, Kristin Bianculli, Robert Blanchard, Virginia Buchanan, Matthew J. Conigliaro, Wayne Hogan, David L. Luck, Wendy F. Lumish, Todd R. McPharlin, Frank Melton, C. Richard Newsome, William C. Ourand, Cristina M. Pierson, Anthony H. Quakenbush, Karina Rodrigues, Eric Rosen, Matthew D. Schultz, Christian D. Searcy, J. Steele Olmstead, John Uustal, and Milette E. Webber. The comments raised concerns that the proposal: did not fully encompass the elements of the comment k defense; would cause confusion; limits state-of-the-art defense; did not fully account for the statutory standard state-of-the-art defense in section 768.1257, Florida Statutes; creates an unnecessary and unfair burden on Florida Consumers and Florida Plaintiffs; and is inconsistent with Florida Law. (*See* Appendix E–19-E–73.) As a result, the Committee revisited its proposal and requests approval of the proposal in Appendix A.

Julie H. Littky-Rubin commented on the December 1, 2018, publication notice of Model Instruction Number 7. (*See* Appendix E–74-E–75.) Ms. Littky-Rubin shared a concern that the amendments to Model Number 7 that remove "designers, manufacturers sellers, importers, distributors, or suppliers of products" creates an ambiguity.

DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee on the proposed amendments to the Instructions discussed above.

CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approve the proposed amendments to Instructions 403.7 — Strict Liability, 403.8 — Strict Liability Failure to Warn, 403.15 — Issues on Main Claim, 403.17 — Burden of Proof on Main Claim, 403.18 — Defense Issues, 403.19 — Burden of Proof on Defense Issues, and Model Instruction Number 7 as detailed above.

Respectfully submitted,

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

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