APPENDIX B

The Florida Bar News

August 15, 2015

Amendments to Jury Instructions in Civil Cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases submits these amendments to Florida Standard Jury Instructions in Civil Cases 403.7. The Committee proposes updating the notes in use to reflect a recent opinion from the Florida Supreme Court.

Interested parties have until September 15, to submit comments electronically or by mail to the Civil Committee at sjicivil@flcourts.org, or to the chair of the Civil Committee, Joseph Lang, Jr., Carlton Fields Jorden Burt, P.A., Corporate Center Three at International Plaza, 4221 West Boy Scout Boulevard, Tampa 33607, jlang@cfjblaw.com, and a copy to the Florida Bar liaison for the committee, Heather Telfer, The Florida Bar, 651 E. Jefferson Street, Tallahassee 32399-6523, htelfer@flabar.org.

403.7 STRICT LIABILITY

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.

a. Design defect$_t$

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

NOTES ON USE FOR 403.7

1. The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co*., 396 So.2d 1140, 1146 (Fla. 1st DCA 1981). Instruction 403.7a retains the definition of manufacturing defect found in former instruction PL 4. The minor changes from the definition found in PL 4 are intended to make this instruction more understandable to jurors without changing its meaning.

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

3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151 n.4 (Fla. 4th DCA 2006); *Force v. Ford Motor Co*., 879 So.2d 103, 107 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co*., 576 So.2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1145–46 (Fla. 1st DCA 1981). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: *Products Liability* to define a product defect. See *Union Carbide Corp. v. Aubin*, 97 So.3d 886 (Fla. 3d DCA 2012); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co.*, 48 So.3d 976 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the consumer expectations test. See *Agrofollajes*, 48 So.3d at 997. Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together. The committee notes, however, that the two-issue rule may be implicated if both tests of design defect are used. *Zimmer Inc. v. Birnbaum*, 758 So.2d 714 (Fla. 4th DCA 2000).

4. In *Force v. Ford Motor Co*., 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed

to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. The decision in *Force* did not directly address the correctness of these instructions. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue.

5. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, *e.g.*, *Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391 (Fla. 4th DCA 1984); *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So.2d 335 (Fla. 3d DCA 1984). See also *Coba v. Tricam Indus., Inc.*, 40 FLW S257, S262 n.2 (Fla. May 14, 2015); *Moorman v. American Safety Equip.*, 594 So.2d 795 (Fla. 4th DCA 1992)~~; *North American Catamaran Racing Ass'n v. McCollister*, 480 So.2d 669 (Fla. 5th DCA 1985)~~.

6. 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. *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).

The Florida Bar News
September 1, 2016

Amendments to jury instructions in civil cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases submits these amendments to the Florida Standard Jury Instructions in Civil Cases. The committee proposes amending the following Florida Standard Jury Instructions in Civil Cases: 403.7 — Strict Liability; 403.18 — Defense Issues; Model Instruction No.7 — Product liability case; negligence and strict liability claims; comparative negligence defense; aggravation of pre-existing injury. These amendments are being submitted to address the decisions in *Aubin v. Union Carbide Corporation*, 177 So. 3d 489 (Fla. 2015), and *Coba v. Tricam Indus., Inc*. 164 So. 3d 637, 648 n.2 (Fla. 2015). Interested parties have until September 30 to submit comments electronically or by mail to the Civil Committee at sjicivil@flcourts.org, or to the chair of the Civil Committee, Rebecca Mercier Vargas, Kreusler-Walsh, Compiani & Vargas, P.A., 501 S. Flagler Drive, Suite 503, West Palm Beach 33401-5913, rvargas@kwcvpa.com, and a copy to The Florida Bar liaison for the committee, Heather Savage Telfer, The Florida Bar, 651 E. Jefferson Street, Tallahassee 32399-6523, htelfer@floridabar.org.

403.7 STRICT LIABILITY

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.

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

NOTES ON USE FOR 403.7

1. ~~The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1146 (Fla. 1st DCA 1981). Instruction 403.7a retains the definition of manufacturing defect found in former instruction PL 4. The minor changes from the definition found in PL 4 are intended to make this instruction more understandable to jurors without changing its meaning.~~*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).

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

~~3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 151 n.4 (Fla. 4th DCA 2006); *Force v. Ford Motor Co.*, 879 So. 2d 103, 107 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So. 2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145–46 (Fla. 1st DCA 1981). Other decisions have relied upon the **Restatement (Third) Of Torts:** *Products Liability* to define a product defect. See *Union Carbide Corp. v. Aubin*, 97 So. 3d 886 (Fla. 3d DCA 2012); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co.*, 48 So. 3d 976 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the consumer expectations test. See *Agrofollajes*, 48 So. 3d at 997. Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together. The committee notes, however, that the two-issue rule may be implicated if both tests of design defect are used. *Zimmer Inc. v. Birnbaum*, 758 So. 2d 714 (Fla. 4th DCA 2000).~~

~~4. In *Force v. Ford Motor Co.*, 879 So. 2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the **Restatement (Third) Of Torts**, *Products Liability*. The decision in Force did not directly address the correctness of these instructions. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue.~~

~~5~~3. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. **Restatement (Second) Torts**, § 402A(2)(a). In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, *e.g.*, *Consolidated Aluminum Corp. v. Braun*, 447 So. 2d 391 (Fla. 4th DCA 1984); *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984). See also *Moorman v. American Safety Equip.*, 594 So. 2d 795 (Fla. 4th DCA 1992); *North American Catamaran Racing Ass'n v. McCollister*, 480 So. 2d 669 (Fla. 5th DCA 1985).

~~6~~4. 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. *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).

403.15 ISSUES ON MAIN CLAIM

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

a. Express Warranty:

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

b. Implied Warrant of Merchantability:

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

c. Implied Warranty of Fitness for Particular Purpose:

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

d. Strict Liability — Manufacturing Defect:

whether (the product) **[was 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)**.**

e. Strict Liability — Design Defect:

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

f. Strict Liability — Failure to Warn:

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

g. Negligence:

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

h. Negligent Failure to Warn:

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

~~NOTE ON USE FOR 403.15~~

~~Instruction 403.15(e) retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. See Instruction 403.7(b) and Note on Use 3. Pending further development in the law, the committee takes no position on whether the consumer expectations and risk/benefit tests should be given alternatively or together.~~

403.18 DEFENSE ISSUES

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

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

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

a. Comparative Negligence:

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

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

b. ~~Risk/Benefit Defense~~<u>Unavoidably Unsafe Product</u>:

~~whether, on balance, the [benefits] [or] [value] of~~ ~~(the product)~~ **~~outweigh the risks or danger connected with its use.~~<u>whether there was no reasonable alternative design for</u>** (the product) **<u>when it was placed on the market and, on balance, at that time, the [benefits] [or] [value] of</u>** (the product) **<u>outweighed the risks or danger connected with its use.</u>**

NOTE ON USE FOR 403.18b

~~In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So. 2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145–46 (Fla. 1st DCA 1981). Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under~~

~~403.18.~~ **Restatement (Second) Of Torts** § 402A (1965), comment k (unavoidably unsafe products).

c. Government Rules Defense:

No instruction provided.

NOTE ON USE FOR 403.18c

F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304; *Universal Insurance Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012); *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

d. State-of-the-art Defense:

In deciding 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].**

NOTE ON USE FOR 403.18d

Instruction 403.18d applies only in defective design cases. *F.S.* 768.1257.

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.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976).

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

MODEL INSTRUCTION NO. 7

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

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 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 a bolt that was part of the steering mechanism was designed in such a way that it could not sustain the speed of highway driving, would loosen over time, weaken, and eventually break. ~~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.~~At the time of the accident, Dilbert Driver was operating the hay baler at an unsafe speed when the bolt 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. Smith sued Driver, alleging that his operation of the hay baler had been negligent. Smith also sued the manufacturer of the hay baler, Mishap Manufacturing Co., and the retailer seller, Sharp Sales, alleging that the hay baler had been defectively designed ~~and that both defendants had been negligent in their inspections of the hay baler. He sought recovery against both the manufacturer and the retailer on claims of (1) negligence and (2) strict liability based on the consumer expectation test.~~ The defendants denied liability, and affirmatively alleged that John Smith had been comparatively negligent. ~~There are also issues of a pre-existing injury.~~The defendants also alleged that some of John Smith's injuries pre-existed the collision with the hay baler and 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 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.~~ <u>John Smith also claims that the hay baler designed by Mishap Manufacturing Company and sold by Sharp Sales Company was defective and that the defect in the hay baler caused him harm.</u>

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. <u>Defendants Mishap Manufacturing Company and Sharp Sales Company also claim that the there was no reasonable alternative design for the steering mechanism of the hay baler and that the benefits of the hay baler outweigh the risks or danger connected with its use.</u>**

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 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.

[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.

~~**[403.15g] 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.

~~**[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, <u>fault,</u> 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**~~

2~~b~~. Did defendant<u>s</u> Mishap Manufacturing Co.<u> and Sharp Sales Co.</u> 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~~ and 2 are ~~all~~both NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answered ~~YES to any of~~ to either Questions~~s~~ 1~~–3~~ or 2 is YES, ~~please~~ answer question 4~~3~~.

4~~3~~. 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~~4~~. 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 2~~a 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~~3~~) %

Total must be 100%

Please answer question ~~6~~5.

6~~5~~. What is the total amount (100%) of any damages sustained by plaintiff, John Smith, and caused by the incident in question?

Total damages of plaintiff, John Smith $

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Smith. If you find plaintiff, John Smith, negligent in any degree, the court, in entering judgment, will reduce Smith's total

amount of damages (100%) by the percentage of negligence which you find is chargeable to 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.~~The plaintiff may elect to also add the phrase "or the risk of danger in the design outweighs the benefits" to instruction 403.15 if he or she wishes to assume the burden of proof in that respect and to prove product defect in this alternative manner. See, *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 511 (Fla. 2015). Likewise, should the defendant allege and present evidence that no reasonable alternative design for the product existed and that the benefits of the product's design outweighed any risk of injury or death caused by the design, instruction 403.18b should be used. See also, **Restatement (Second) Of Torts** §402a, comment k.

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).

The Florida Bar News

May 15, 2018

Amendments to jury instructions dealing with burdens of proof

The Supreme Court Committee on Standard Jury Instructions in Civil Cases submits these amendments to the Florida Standard Jury Instructions in Civil Cases 403.17 Burden of Proof on Main Claims, 403.18 Defense Issues, and 403.19 Burden of Proof on Defense Issues. The proposed amendments to 403.18 were initially published for comment September 1, 2016, but the notice inadvertently omitted proposed amendments to subdivision e. Amendments to instructions 403.17 and 403.19 conform to the Court's opinion in *In re: Standard Jury Instructions in Civil Cases—Report No. 17-03*, 236 So. 3d 919 (Fla. 2018).

Interested parties have until June 15, 2018, to submit comments electronically, **sjicivil@flcourts.org**, or to the Chair of the Civil Committee, Laura Whitmore, Shook, Hardy & Bacon, 100 N. Tampa, Street, Suite 2900, Tampa, FL 33602-5810, **lwhitmore@shb.com**, and a copy to The Florida Bar Liaison for the Committee, Heather Savage Telfer, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-6523, **htelfer@floridabar.org**.

403.17 BURDEN OF PROOF ON MAIN CLAIM

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

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

NOTE ON USE FOR 403.17

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

403.18 DEFENSE ISSUES

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

On the [first]* defense, the issue[s] for you to decide [is] [are]:
**The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

a. Comparative Negligence:

whether (claimant or person for whose injury or death claim is made) **was [himself] [herself] negligent *in** (describe alleged negligence) **and, if so, whether that negligence was a contributing legal cause of the injury or damage to** (claimant)**.**
*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

b. ~~Risk/Benefit Defense~~Unavoidably Unsafe Product:
~~whether, on balance, the [benefits] [or] [value] of~~ ~~(the product)~~ **~~outweigh the risks or danger connected with its use.~~whether there was no reasonable alternative design for** (the product) **when it was placed on the market and, on balance, at that time, the [benefits] [or] [value] of** (the product) **outweighed the risks or danger connected with its use.**

NOTE ON USE FOR 403.18b

~~In a strict liability defective design case, a defendant may be entitled to an~~

~~affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So. 2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145–46 (Fla. 1st DCA 1981). Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.~~ **Restatement (Second) Of Torts** § 402A (1965), comment k (unavoidably unsafe products). Comment k has only been applied in Florida to medical devices, drugs, and vaccines and has not been extended to any other class of product. Pending further development in the law, the committee takes no position on whether this instruction is appropriate for products other than medical devices, drugs, and vaccines.

c. Government Rules Defense:

No instruction provided.

NOTE ON USE FOR 403.18c

F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304; *Universal Insurance Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012); *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

d. ~~State-of-the-art Defense:~~
In deciding 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].~~**

~~NOTE ON USE FOR 403.18d~~

~~Instruction 403.18d applies only in defective design cases. *F.S.* 768.1257.~~

~~*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 403.18~~e~~d

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.

e. Learned intermediary defense to failure to warn claims for products supplied through an intermediary:
whether (the defendant) **provided reasonable instructions or warnings to** (intermediary) **and reasonably relied upon [it] [him] [her] to provide reasonable instructions or warnings to the user of the product.**
In determining whether (defendant) **reasonably relied on intermediary to provide reasonable instructions or warnings to users of** (the product)**, you may consider the nature and significance of the risk involved in using the product, the likelihood that** (intermediary) **would convey the instructions or warnings to the user of the product, and the feasibility and effectiveness of** (defendant) **directly warning the user.**

NOTE ON USE FOR 403.18e

See *Aubin v. Union Carbide Corp.*, 117 So. 3d 489, 515–16 (Fla. 2015). The list of factors set forth in this instruction is not exclusive and may be modified to fit the facts of the case.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976).

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

3. For the state-of-the-art defense see, *F.S.* 768.1257.

403.19 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) **defense[s] and the greater weight of the evidence supports** (claimant's) **[claim] [one or more of** (claimant's) **claims], then [your verdict should be for** (claimant) **in the total amount of [his] [her] damages.] *[you should decide and write on the verdict form what percentage of the total [negligence] [fault] [responsibility] of [both] [all] defendants ~~was caused by~~you apportion to each defendant whose [negligence] [fault] [responsibility] you find was a legal cause of loss, injury, or damage to** (claimant)**.]**

**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 what percentage of the total [negligence] [fault] [responsibility] of [both]**

[all] parties to this action ~~was caused by~~you apportion to 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))**] ~~was caused by~~you apportion to each of them.]**

Use the following paragraph in cases without a comparative negligence defense but with an apportionment of non-party defense:

[If, however, the greater weight of the evidence shows that [(defendant)**] [one or more of** (defendants)**] and [**(identify additional person(s) or entit(y)(ies))**] were [negligent] [at fault] [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))**] ~~was caused by~~you apportion to each of them.]**

NOTES ON USE FOR 403.19

1. *Preemptive instructions on defense issues.* If a preemptive instruction for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of instruction 401.13 should be given immediately following instruction 403.15. If a preemptive instruction for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive instruction announcing the ruling should be given immediately after framing the defense issues (instruction 403.18).

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.

PROPOSED AMENDMENTS TO CIVIL JURY INSTRUCTIONS

Dec 01, 2018

PROPOSED AMENDMENTS TO JURY INSTRUCTIONS IN CIVIL CASES

The Supreme Court Committee on Standard Jury Instructions in Civil Cases propose errors and omissions amendments to 502.5 (Comparative Negligence, Non-Party Fault, and Multiple Defendants) to correct an error in the first note on use; 700 (Closing Instructions) to correct a typographical error and amend the second to last paragraph to avoid confusion; Model Instruction 1 to add a specific question on the permanency of the injury; and to include a previously published amendment to instruction 201.3; and the hypothetical to Model Instruction 2 to make clear that Model Instruction 2 is addressing a loss of consortium claim.

Model Instructions Nos. 1–7 are also being amended to conform the model instructions to the corresponding standard instructions; to make the use of italics consistent throughout the model instructions; to eliminate the use of all caps in the model jury verdict forms; and to confine the use of the model opening and closing instructions to Model Instruction No. 1.

Interested parties have until January 2, 2019, to submit comments electronically, sjicivil@flcourts.org, or to the Chair of the Civil Committee, Laura Whitmore, Shook, Hardy & Bacon, 100 N. Tampa, Street, Suite 2900, Tampa, FL 33602-5810, lwhitmore@shb.com, and a copy to The Florida Bar Liaison for the Committee, Heather Savage Telfer, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-6523, htelfer@floridabar.org.

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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 John Smith, who was driving in the opposite direction. At the time, John 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 Dilbert Driver, had not inspected it. The mechanism had broken, making it impossible for Dilbert 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. John Smith sued Dilbert Driver, alleging that his operation of the hay baler had been negligent. John Smith also sued the manufacturer of the hay baler, Mishap Manufacturing Co., and the retailer seller, Sharp Sales Co., alleging that the hay baler had been defectively designed and that both defendants had been negligent in their inspections of the hay baler. He sought recovery against both the manufacturer and the retailer on claims of (1) negligence and (2) strict liability based on the consumer expectation test. The defendants denied liability, and affirmatively alleged that John 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~~the instructions to be given given at the beginning and end 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*~~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 Co~~mpany.~~., the manufacturer of the hay baler, and Sharp Sales Co~~mpany.~~., the seller of the hay baler, were negligent——Mishap Manufacturing Co. in designing and inspecting the hay baler, and Sharp Sales Co. 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 Manufacturing Co. and sold by Sharp Sales Co. was defective and that the defect in the hay baler caused him harm.

~~*All three defendants*~~All three defendants deny ~~these~~those 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*~~In the case of a manufacturer or seller of a product, it is the care that a reasonably careful ~~designer,~~ manufacturer~~,~~ or seller~~, importer, distributor, or supplier~~ would use under like circumstances. Negligence is doing something that a reasonably careful ~~designer,~~ manufacturer~~,~~ or 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.

[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.

[403.15g] The issues you must decide on John Smith's claim of negligence ~~on the part of~~against Mishap Manufacturing Co~~mpany~~., the manufacturer of the hay baler, ~~is~~are whether Mishap Manufacturing Co~~mpany~~. 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*~~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~~against Sharp Sales Co~~mpany~~., the seller of the hay baler, are whether Sharp Sales Co~~mpany~~. was negligent in failing to inspect the hay baler before selling it to John Smith, and, if so, whether that ~~*negligence*~~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 Co~~mpany~~., the manufacturer of the hay baler, and Sharp Sales Co~~mpany~~., 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 Co~~mpany~~., and Sharp Sales Co~~mpany~~.

[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*~~against one or more of the defendants, then you shall consider the defenses raised by those defendants.

[403.18(a)] 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] ~~*On the second defense*~~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 Co~~mpany~~., and Sharp Sales Co~~mpany~~., 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 Co~~mpany~~., and Sharp Sales Co~~mpany~~., 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 in entering judgment will make any appropriate reduction(s).

~~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 or

activation. 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 Co~~mpany~~. and Sharp Sales Co~~mpany~~. The third is the product defect claims against Mishap Manufacturing Co~~mpany~~. and Sharp Sales Co~~mpany~~. 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 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 John Smith's total amount of damages (100%) by the percentage of negligence which you ~~find is chargeable~~attribute 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).