# APPENDIX C

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

**TO:** Florida Supreme Court Standard Jury Instructions Committee (Civil)
**FROM:** Rebecca Mercier Vargas
**DATE:** July 8, 2015
**RE:** Products Liability Subcommittee Report - *Coba v. Tricam Indus., Inc.*, 40 Fla. L. Weekly S257 (Fla. May 14, 2015)

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The products subcommittee met by phone to consider the recent decision in *Coba v. Tricam Indus., Inc*., 40 Fla. L. Weekly S257 (Fla. May 14, 2015). *Coba* involves whether fundamental error occurs when the jury in a product liability case finds the defendant was **negligent** in designing the product, but there is no design **defect**. The decision recognizes the verdict was inconsistent, but holds the unpreserved error is not fundamental. The defendant must raise the inconsistent verdict before the jury is discharged. The Court expressly disapproves *North American Catamaran Racing Ass'n v. McCollister,* 480 So. 2d 669 (Fla. 5th DCA 1985), which held the inconsistency of this type of verdict "is of a fundamental nature."

In footnote 2, the *Coba* decision observes that "the possibility of an inconsistent verdict in this type of case, where both theories are presented to the jury, is actually referred to in the comments" of the standard jury instructions in products cases. Instruction 403.7, note on use 5 states:

> 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 *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).**

On June 10, the subcommittee met by phone to discuss whether to revise the products instructions or model instruction 7 in light of *Coba*. Subcommittee members Brian Baggot, Jeff Cohen, Laura Whitmore, and Rebecca Vargas were able to attend the call. Although Phil Burlington and Liz Russo were unable to join the call, they submitted comments by e-mail before the call.

The subcommittee unanimously agreed to amend note on use 5 to (1) add a "see also" citation to footnote 2 of *Coba*; and (2) delete the citation to *North American Catamaran*. The subcommittee decided that the remaining cases cited in note 5 adequately warn the public about the possibility of an inconsistent verdict. *Compare Consolidated Aluminum*, 447 So. 2d at 392 ("Since the jury found no defect, we hold that it was inconsistent to find negligence . . . ."), and *Ashby*, 458 So. 2d at 337 (finding the verdict inconsistent because "the jury did not find defendants liable under the theory of strict liability, thus rejecting the claim that a defect existed in the ladder" and "[a]bsent proof of a defect, there were no grounds upon which to find defendants negligent"), *with Moorman*, 594 So. 2d at 800-01 (holding a verdict of no defect is consistent with a verdict of negligent failure to warn; "it is unnecessary in a strict liability action to show the manufacturer has been negligent in any way").

One subcommittee member, Brian Baggot, suggested adding language to the note on use warning of other possible consequences from an inconsistent verdict. For example, *Coba* recognizes that the trial court may enter a JNOV for the defendant if no view of the evidence supports one of the jury's findings **as opposed to the other in the event of an inconsistent verdict** ("If a party fails to timely object to an inconsistent verdict, that party waives the objection and ***unless there is no evidence to support one finding***, the trial court may properly enter judgment pursuant to that verdict.") (Slip op. at 27; FLW at S261).

The rest of the subcommittee disagreed. The consensus was that commenting on the sufficiency of the evidence goes beyond the scope of the note on use. We will await further development in the cases to resolve the issue of inconsistent verdicts.

After the subcommittee meeting, Gary Farmer suggested deleting the citations in the note 5 to *Consolidated Aluminum Corp. v. Braun*, 447 So. 2d 391 (Fla. 4th DCA 1984), and *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984). He believes that citing these cases is misleading because the *Coba* decision has now settled the law on inconsistent verdicts in products liability cases. However, during our conference call, the subcommittee had discussed at length the holding and impact of the *Coba* decision. The consensus was that the note provides the best and most neutral guidance on the possibility of inconsistent verdicts.

Here is the revision to note 5 to instruction 403.7 proposed by the subcommittee:

* * * *

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.

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).

# Supreme Court of Florida

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No. SC12-2624

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**DIANA COBA, etc.,**
Petitioner,

vs.

**TRICAM INDUSTRIES, INC., et al.,**
Respondents.

[May 14, 2015]

PARIENTE, J.

When a jury in a civil case returns with an inconsistent verdict and a party does not object before the jury is discharged, the well-established law has been that the party waives any objections to the inconsistent verdict. The conflict issue presented in this case is whether, in products liability cases, there is a "fundamental nature" exception to this general rule—that is, an exception that does not require a party to immediately object to an inconsistent verdict—where the jury finds that the defendant was negligent in the design of the product but also finds that the product did not contain a design defect.

The decision of the Third District Court of Appeal in Tricam Industries, Inc. v. Coba, 100 So. 3d 105 (Fla. 3d DCA 2012), applied the "fundamental nature" exception, which was previously recognized by the Fourth District Court of Appeal in Nissan Motor Co. v. Alvarez, 891 So. 2d 4, 8 (Fla. 4th DCA 2004), and the Fifth District Court of Appeal in North American Catamaran Racing Ass'n (NACRA) v. McCollister, 480 So. 2d 669, 671 (Fla. 5th DCA 1985). Application of the "fundamental nature" exception, however, is in express and direct conflict with a line of cases that require a party to object to an inconsistent verdict prior to the discharge of the jury and that require a jury, rather than an appellate court, to resolve an inconsistent verdict. See, e.g., Cocca v. Smith, 821 So. 2d 328, 330-31 (Fla. 2d DCA 2002); Gup v. Cook, 549 So. 2d 1081, 1083-84 (Fla. 1st DCA 1989). We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

Consistent with our long-standing precedent, we hold that a party must timely object to an inconsistent verdict under these circumstances or the issue is waived. Thus, we reject the reasoning of the Third District majority and agree with Judge Schwartz's dissent that there is no "fundamental nature" exception to the inconsistent verdict law in a civil case that applies only to products liability cases, because there is "no conceptual or reasoned basis for the distinction and no cognizable way to apply it." Tricam Indus., 100 So. 3d at 115 (Schwartz, J., dissenting).

In applying this exception in this case, the Third District improperly disregarded the jury's determination of liability in favor of the plaintiffs and directed the trial court to enter judgment in favor of the party that failed to raise the inconsistent verdict issue before the jury was discharged. This holding also conflicts with well-established law, which requires a jury—not a court—to resolve the inconsistency.

We accordingly quash Tricam Industries and disapprove of Nissan Motor and NACRA. Because the defendants, Tricam Industries and Home Depot, failed to timely raise their objection to the jury's inconsistent verdict, the trial court did not err in denying the defendants' motion to set aside the verdict, and thus the trial court's judgment should be reinstated.

**FACTS**

This case stems from a tragic accident in which Roberto Coba fell from a thirteen-foot aluminum ladder, resulting in his death. Diana Coba, as the personal representative of Roberto Coba's estate, filed an action against Tricam Industries, which manufactured the ladder involved in the accident, and against Home Depot, which sold the ladder. In the complaint, Coba alleged that both Tricam Industries and Home Depot were liable on the basis of strict liability because they designed, manufactured, marketed, distributed, or sold a ladder in a defective and dangerous condition. The complaint further alleged that the defendants were also liable under

negligence theories because they had a duty to use reasonable care to market, sell, and distribute the ladder in a reasonably safe condition.

At trial, Coba presented testimony from the decedent's daughter and stepson, both of whom were present when the accident occurred. Coba also presented evidence as to whether the ladder had a design defect—evidence that was disputed. As summarized by the Third District:

> [T]he plaintiff's expert, Dr. Farhad Booeshaghi, a consulting engineer and accident reconstructionist, testified that the ladder was defectively designed because it was capable of falsely appearing to be in a locked position since the pins in the "J locks," which attached to the ladder's outer rails, "click[ed]" as if they were locked even when they were not. He explained that when that occurred, the ladder was capable of temporarily holding a person's weight, giving the user a false sense of security. Dr. Booeshaghi opined that at the time of the accident, the ladder was in such a "false lock" position, and the false-lock-failure, combined with the decedent's weight, caused the ladder to "telescope" at full extension, impelling the ladder forward and launching the decedent backward. He also opined that the inclusion of an additional crossbar would have increased the structural rigidity of the ladder and prevented the ladder from telescoping. Lastly, he testified that the accident would not have occurred had the locks been properly locked, and that it was ultimately the decedent's responsibility to properly lock the ladder.
>
> Conversely, the defendants' expert, Mr. Jon Ver Halen, a consulting engineer, testified that the ladder was not defectively designed. He opined that it was impossible for a "false lock" to occur on an articulating ladder, and explained that, given the "factor of safety" built into the ladder's "load factor," it could not have structurally failed when used in its intended manner. In addition, Mr. Ver Halen explained that, based on the ladder's length and likely position against the house, and the location and types of marks and deformations left on the wall, floor, and ladder, the accident could not have been caused by the telescoping process described by Dr. Booeshaghi. Instead, according to Mr. Ver Halen, the physical

> evidence suggested that the ladder was set up on a "relatively slippery" surface, enabling the ladder to slide as the decedent climbed it, and ultimately giving way, causing the decedent to fall.

Tricam Indus., 100 So. 3d at 107 (footnote omitted).

Although Coba had initially also claimed that the warnings on the ladder were defective, she later withdrew that claim. The jury was instructed as to the standard for finding a design defect under strict liability and the standard for finding negligence on the basis of design, distribution, and sale of the ladder. Specifically, the jury instructions on these two issues read:

> Plaintiff claims that Defendants, Tricam Industries and Home Depot, were negligent in the design, distribution, and sale of its Tricam ladder, which caused the death of Roberto Coba.
>
> Plaintiff also claims that regardless whether Tricam Industries and Home Depot were negligent or not, it is strictly liable because it placed a ladder on the market in a defective condition, unreasonably dangerous to the user, and that the defect was the cause of Roberto Coba's death.
>
> Defendants, Tricam Industries and Home Depot, deny those claims, and also claim that Roberto Coba was himself negligent in his use of the ladder, which caused his death.
>
> The parties must prove their claims by the greater weight of the evidence.

As to negligence, the trial court gave the standard jury instruction at that time:

> 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.

The trial court then explained the claim of strict liability as follows:

> A product is defective if by reason of its design the product is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting its condition. A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer.

The trial court also provided the jury with special interrogatories, without objection from either side, in which the question of design defect preceded the question of negligence, and the jury returned the following verdict as to liability issues:

> 1. Did Defendants, Tricam Industries and/or Home Depot, place the ladder on the market with a design defect, which was a legal cause of Roberto Coba's death?
>
> YES _____ NO ___X___
>
> 2. Was there negligence on the part of Defendants, Tricam Industries and/or Home Depot, which was a legal cause of Roberto Coba's death?
>
> YES ___X___ NO _____

Following the special interrogatories, the jury verdict form directed the jury: "If your answer to either or both Question 1 and 2 is 'YES', please continue to answer the remaining questions," at which point the verdict form asked whether the decedent was at fault and to apportion fault. The jury made the following findings:

> 3. Was there negligence on the part of the decedent, Roberto Coba, which was a legal cause of his death?

YES ___X___ NO _____

4. Please state the percentage of fault you charge to:

Defendant, Tricam [&]

Defendant, Home Depot __20%__

Roberto Coba, decedent __80%__

As to the award of damages, the jury awarded no damages to the estate for medical and funeral expenses, awarded $70,000 to Coba's daughter for the loss of her father's support and services, and awarded $1,500,000 to Coba's daughter for the loss of parental companionship and for pain and suffering as a result of the death of her father. After the verdict was read, neither party objected to the verdict. The jury was then discharged.

The defendants subsequently filed a motion to set aside the verdict, asserting that the jury verdict was fundamentally inconsistent because there could be no finding of a negligent design without finding that a design defect contributed to the fall, and the jury determined that there was no defect. In response, Coba asserted that the inconsistent verdict claim was waived since the defendants failed to raise this claim before the jury was discharged. Alternatively, Coba stated that if the trial court "should see fit to relieve the Defendants of their burden to object to an inconsistent verdict before the discharge of the jury, the remedy that should be granted is not a judgment notwithstanding the verdict. Instead, the only proper

remedy would be a new trial on all liability issues." The trial court denied the defendants' motion to set aside the verdict.

Coba also filed a post-trial motion, asserting that she was entitled to a new trial on various grounds, including that the amount of the verdict was legally insufficient since it failed to award the undisputed amounts of the decedent's medical expenses and funeral bills. The trial court denied Coba's motion for a new trial, except for the portion alleging an inadequate verdict as to the undisputed medical expenses, and increased the jury's verdict to include an award of medical expenses in the amount of $179,739. After reducing the total amount of damages based on the percentage of fault attributed to the decedent (80%), the trial court entered judgment for Coba in the amount of $349,947.80. Both parties appealed.

As to the conflict issue before this Court pertaining to the inconsistent verdict, the Third District disagreed with the trial court's decision to deny the defendants' motion to set aside the verdict, despite their failure to timely object. In reaching this decision, the Third District first recognized that, generally, a party must object if that party believes that a verdict is inconsistent; otherwise, that objection is waived. Tricam Indus., 100 So. 3d at 108-09. However, after reviewing decisions in other products liability design cases, the Third District held that a party does not waive a challenge to an inconsistent jury verdict by failing to object prior to the discharge of the jury so long as the inconsistency is of a

"fundamental nature." Id. at 111. As applied in this case, the Third District determined that the jury's inconsistent verdict was of a "fundamental nature" because in one portion of the jury's verdict, the jury found that there was no design defect, but in another portion, the jury found that the defendants were negligent—a claim that was predicated on finding a design defect. Id.

The Third District then determined that the trial court should have entered judgment in favor of the defendants, explaining that "the only evidence offered against the defendants related to a purported design defect, and the jury specifically found there was no design defect. Because there was no evidence to support any other cause of action, there remains no issue to be resolved on remand." Id. The Third District did not, however, explain how it could determine which of the conflicting findings in the jury's verdict represented the jury's actual intent.

Judge Schwartz dissented with regard to the treatment of the "fundamental nature" exception. As Judge Schwartz explained, in his view, the defendants waived this issue by not raising it after the jury returned an inconsistent verdict, and that even if this were not the case, the appropriate remedy would be a new trial:

> a) The [defendants] waived the right to complain of any inconsistent verdict because of [their] failure to request that the conflict be resolved by the jury after its allegedly flawed verdict was returned.
>
> b) Even if this were not so, the appropriate remedy is not, as the majority does, simply to resolve the conflict in favor of

> [defendants] but a new trial so that a jury and not the court may decide the question.

Id. at 114 (Schwartz, J., dissenting).

While Judge Schwartz recognized that the majority had adopted the "fundamental nature" exception previously recognized by the Fourth District and the Fifth District, Judge Schwartz questioned the validity of this exception, stating, "The simple comeback is that there is no conceptual or reasoned basis for the distinction and no cognizable way to apply it." Id. at 115. Judge Schwartz also disagreed that a court could resolve an acknowledged inconsistent verdict on its own, much less resolve the inconsistency in favor of the party who failed to object and in a manner contrary to the verdict itself. Id. at 116-17.

**ANALYSIS**

The conflict issue before this Court is whether there is a "fundamental nature" exception to the general jurisprudence recognized in a long line of cases that require parties to object to an inconsistent verdict prior to the discharge of the jury and that require a jury—rather than a court—to resolve an inconsistent verdict when that issue was timely raised. We begin by discussing the general obligations imposed on parties when a jury's verdict is inconsistent, the purpose of requiring an immediate objection, and the appropriate relief that is necessary when a party timely objects to an inconsistent verdict. We then examine the origin of the "fundamental nature" exception and how the courts that adopted this exception

have resolved an inconsistent verdict. Finally, we conclude that a timely objection is required for all inconsistent verdicts and apply our holding to this case.

## I. General Law Pertaining to Inconsistent Jury Verdicts

A jury's verdict in a civil case is generally "clothed with a presumption of regularity." Republic Servs. of Fla., L.P. v. Poucher, 851 So. 2d 866, 869 (Fla. 1st DCA 2003). Thus, "an appellate court will not disturb a final judgment if there is competent, substantial evidence to support the verdict on which the judgment rests." Berges v. Infinity Ins. Co., 896 So. 2d 665, 675-76 (Fla. 2004). In fact, an appellate court is not authorized to substitute its judgment for that of the jury. Id. at 676. This Court has long held that if no objection to the verdict is made by either party, any defect to the form of the verdict is waived. See Higbee v. Dorigo, 66 So. 2d 684, 685 (Fla. 1953).

Courts have distinguished cases involving inadequate verdicts from those that are characterized as inconsistent. A verdict is not necessarily inconsistent simply because it fails to award enough money or even no money at all. In those circumstances, "the issue is the adequacy of the award, not its consistency with any other award by the verdict." Deklyen v. Truckers World, Inc., 867 So. 2d 1264, 1266 (Fla. 5th DCA 2004) (quoting Avakian v. Burger King Corp., 719 So. 2d 342, 344 (Fla. 4th DCA 1998)). An objection to the inadequacy or excessiveness of a verdict can be raised in a motion for a new trial without requiring a party to

object prior to the jury's discharge. Progressive Select Ins. Co. v. Lorenzo, 49 So. 3d 272, 277 (Fla. 4th DCA 2010); Causeway Vista, Inc. v. State, Dep't of Transp., 918 So. 2d 352, 355 (Fla. 2d DCA 2005).

On the other hand, an inconsistent verdict is defined as when two definite findings of fact material to the judgment are mutually exclusive. See Smith v. Fla. Healthy Kids Corp., 27 So. 3d 692, 695 (Fla. 4th DCA 2010); Alvarez v. Rendon, 953 So. 2d 702, 710 (Fla. 5th DCA 2007). "Where the findings of a jury's verdict in two or more respects are findings with respect to a definite fact material to the judgment such that both cannot be true and therefore stand at the same time, they are in fatal conflict." Smith, 27 So. 3d at 695 (quoting Crawford v. DiMicco, 216 So. 2d 769, 771 (Fla. 4th DCA 1968)). "To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged and ask the trial court to reinstruct the jury and send it back for further deliberations." Ellender v. Bricker, 967 So. 2d 1088, 1091 (Fla. 2d DCA 2007) (quoting Cocca, 821 So. 2d at 330).

Each of Florida's five district courts of appeal has long recognized the general rule that a party must object to an inconsistent jury verdict before the jury is discharged. See, e.g., Nationwide Mut. Fire Ins. Co. v. Harrell, 53 So. 3d 1084, 1088 (Fla. 1st DCA 2010) ("To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged.");

Ellender, 967 So. 2d at 1091 ("To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged and ask the trial court to reinstruct the jury and send it back for further deliberations." (quoting Cocca, 821 So. 2d at 330)); J.T.A. Factors, Inc. v. Philcon Servs., Inc., 820 So. 2d 367, 371 (Fla. 3d DCA 2002) ("A contention that a jury verdict is inconsistent must be raised at the time the verdict is read and before the jury is released in order to allow an opportunity to cure."); Progressive Select Ins. Co., 49 So. 3d at 277 ("Consistent with common law and its evolution throughout Florida case law, a jury verdict which is truly inconsistent requires an objection prior to the discharge of the jury." (footnote omitted)); Simpson v. Stone, 662 So. 2d 959, 961 (Fla. 5th DCA 1995) ("It has long been the general rule that a party is obligated to object to an inconsistent verdict prior to discharge of the jury."). Further, the appellate courts have been uniform in enunciating the principle that if a party fails to timely object, the issue is waived. If a party timely objects to an inconsistent verdict and the trial court erroneously denies the objection and discharges the jury, the correct remedy is to grant a new trial.

The reasons for requiring an immediate objection are numerous. First, by requiring parties to object as soon as they are aware of the verdict, the jury is still available to correct the error. Moorman v. Am. Safety Equip., 594 So. 2d 795, 799 (Fla. 4th DCA 1992) ("It is quite basic that objections as to the form of the verdict

or to inconsistent verdicts must be made while the jury is still available to correct them.").

Second, by requiring this type of objection to be voiced prior to a jury's discharge, it prevents a party from strategically sitting on the objection until after the jury is no longer available to correct its decision. As numerous courts have observed, permitting later challenges would encourage parties to not timely object "as a conscious choice of strategy" since the complaining party may risk having the award unfavorably adjusted. See C.G. Chase Constr. Co. v. Colon, 725 So. 2d 1144, 1145 (Fla. 3d DCA 1998); Keller Indus., Inc. v. Morgart, 412 So. 2d 950, 951 (Fla. 5th DCA 1982) ("For all we know, defendant's trial counsel intentionally, for tactical reasons, chose not to bring the problem to the court's attention.").

Third, mandating parties to immediately object preserves limited judicial resources, since it permits the error to be rectified during the initial trial and reduces the likelihood that a second trial would become necessary. See Moorman, 594 So. 2d at 799 ("[T]he societal interest in furnishing only a single occasion for the trial of civil disputes would be entirely undone by the granting of second trials for reasons which could have been addressed at the first.").

Finally, requiring an objection at the time the jury can still correct its error maintains the strong deference that the judicial system places on a jury's verdict.

In fact, it is for this reason that in cases where a trial court erroneously denies a timely challenge to an inconsistent verdict, the proper remedy is a new trial, rather than entry of judgment in favor of the objecting party. As was recognized by the Fourth District in Moorman, "the importance of the right to trial by jury implicates a strong deference to a jury's decision, requiring that its verdict be sustained if at all possible." Id. In light of these principles, we now review the decisions applying the "fundamental nature" exception in products liability cases and the basis underlying this exception.

## II. Whether There is a "Fundamental Nature" Exception to An Inconsistent Verdict for Products Liability Design Cases

The law surrounding inconsistent verdicts is twofold: (1) the objecting party must bring an inconsistent verdict to the trial court's attention before the jury is discharged or the issue is waived; and (2) if the inconsistent verdict is not resolved by the jury, a new trial is required. However, in Tricam Industries, NACRA, and Nissan Motor, the district courts enunciated a "fundamental nature" exception in products liability cases and then, instead of ordering a new trial, entered judgment in favor of the non-objecting party by elevating one jury finding (that there was no design defect) over the other jury finding (that there was negligence in the design that was a legal cause of injury or death).

Specifically, in the decision which first created this exception, NACRA, the plaintiff brought an action against a boat manufacturer on the basis of strict

liability and negligence, alleging that the defendant was negligent in designing a catamaran. NACRA, 480 So. 2d at 670. The jury found that the catamaran was not defective, but held that the defendant was negligent. Id. at 670-71. The defendant did not object to the verdict before the jury was discharged. Id. at 671. However, in a later motion for judgment notwithstanding the verdict, the defendant asserted that the verdict was inconsistent and required a new trial. Id. at 671 n.2.

The Fifth District recognized that while generally a party must object to an inconsistent verdict before the jury is discharged in order to preserve the claim, this rule did not apply to this specific situation because the inconsistency was of a "fundamental nature," where the jury explicitly held that there was no design defect. Id. at 671. Accordingly, the court reversed the judgment and remanded for entry of judgment in the defendant's favor. Id.

However, the two cases relied upon in NACRA to establish the "fundamental nature" exception actually stand for the opposite holding and stress that a party must timely object to any error pertaining to the verdict or the argument is waived. See Robbins v. Graham, 404 So. 2d 769, 771 (Fla. 4th DCA 1981) ("Objections to the form of the verdict, under these facts, must be timely made and failure to object resulted in a waiver by appellee."); Papcun v. Piggy Bag Disc. Souvenirs, Food & Gas Corp., 472 So. 2d 880, 881 (Fla. 5th DCA 1985) ("It is well established that a failure to object to a verdict form regarding defects not of

a constitutional or fundamental character constitutes a waiver of such defects."). Even the Fourth District itself has seemed perplexed as to NACRA's reliance on its opinion in Robbins for the "fundamental nature" exception. See Moorman, 594 So. 2d at 799 ("Curiously, the court cites our Robbins decision for this proposition, but there is really nothing in it to support the citation."). When Nissan Motor later adopted the "fundamental nature" exception in 2004, the court simply relied on the holding in NACRA and failed to define the parameters of this exception. See Nissan Motor, 891 So. 2d at 8.

Beyond its lack of support in caselaw, there are numerous problems with the so-called "fundamental nature" exception in general. First, the "fundamental nature" exception is at odds with the general principles that govern inconsistent verdicts and the judicial policy reasons undergirding the requirement of a timely objection, including upholding the sanctity of the jury's role in a trial, preventing strategic gamesmanship, and increasing judicial efficiency.

Second, an inconsistent verdict does not mean that there was no evidence to support one finding over another finding. If that were the case, the proper procedure would have been a motion for judgment notwithstanding the verdict.

Specifically, a JNOV motion alleges that the evidence was insufficient to support the verdict at all. When a court is faced with a motion for a JNOV, the court must view all facts and reasonable inferences "in favor of the verdict." Irven

v. Dep't of Health & Rehab. Servs., 790 So. 2d 403, 406-07 (Fla. 2001). "A motion for directed verdict or JNOV should be granted only if no view of the evidence could support a verdict for the nonmoving party and the trial court therefore determines that no reasonable jury could render a verdict for that party." New Jerusalem Church of God, Inc. v. Sneads Cmty. Church, Inc., 147 So. 3d 25, 28 (Fla. 1st DCA 2013) (emphasis added) (quoting Lindon v. Dalton Hotel Corp., 49 So. 3d 299, 303 (Fla. 5th DCA 2010)). This standard preserves the sanctity of the verdict itself by resolving all doubts in favor of the verdict. In contrast, the "fundamental nature" exception rests on the verdict itself—i.e., although sufficient evidence was presented to permit the jury to determine the factual issues, one portion of the verdict conflicts with another portion of the verdict. One cannot resolve this conflict "in favor of the verdict" because the verdict itself is the problem.

Third, the "fundamental nature" exception is at odds with the extremely limited use of "fundamental" errors as specifically applied in civil cases. In contrast to criminal cases where the "fundamental error" doctrine is utilized, in civil cases, reversal based on the concept of "fundamental error" where a timely objection has not been made is exceedingly rare. This Court has gone so far as to explain that fundamental error must implicate a constitutional right, such as due process, or the error must be so significant that requiring a new trial is essential to

maintain public trust in our jury trial system. See, e.g., Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1026 (Fla. 2000). In other words, the error must have been so significant that it deprived one party of the right to a fair trial and due process. Such a circumstance is not before the court where the jury reached a verdict and determined damages, even if its findings could be termed inconsistent as to the basis for its liability determination but there was evidence to support the jury's findings. The parties have an opportunity to object to an inconsistent verdict if they choose to do so.

Fourth, the parameters of the exception are difficult, if not impossible, to define. Despite the enunciation of this "fundamental nature" exception in products liability cases, there is no conceptual legal basis to distinguish those cases from other cases in which the jury verdict was equally inconsistent but the exception did not apply.

Specifically, a review of multiple inconsistent verdict cases demonstrates that district courts have not consistently utilized the "fundamental nature" exception, even where one portion of the verdict absolutely precluded the finding that a jury made in another portion of its verdict. For example, in Wharfside Two, Ltd. v. W.W. Gay Mechanical Contractor, Inc., 523 So. 2d 193 (Fla. 1st DCA 1988), the investors in a hotel brought a lawsuit against Chanen Construction Company, which was the general contractor, and Gay Mechanical Contractor, the

subcontractor that constructed the hotel's water system. As the only problem involved the water system installed by Gay, Chanen's liability was completely derivative based on its status as the general contractor who employed subcontractor Gay; no other basis of liability against Chanen existed. Id. at 195. Yet, the jury returned a verdict that found Chanen liable to Wharfside, but found Gay not liable. Id. Chanen asserted that the verdict was fatally inconsistent. Id. at 194.

The First District agreed that "the verdict contains [an] inconsistency which fundamentally undermines its underlying basis." Id. at 196 (emphasis added). Despite making that observation, however, the First District did not apply the "fundamental nature" exception that would require judgment to be entered in favor of Chanen, as no independent basis existed for its liability in light of the finding that Gay was not liable. Instead, because the jury was not provided with the opportunity to correct its inconsistent verdict, the case was remanded for a new trial. This Court approved the First District's holding on that basis, stating, "[t]he district court's discussion of verdict inconsistency fully addresses that issue." W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348, 1351 (Fla. 1989).

Other courts have reached similar conclusions in other inconsistent verdict cases that do not involve products liability claims, including even cases from the Third and Fifth Districts where the "fundamental nature" exception has been

recognized for products liability cases. In First Sealord Surety, Inc. v. Suffolk Construction Co., 995 So. 2d 609, 610 (Fla. 3d DCA 2008), the Third District did not apply the "fundamental nature" exception to an inconsistent verdict where the jury held that a principal was not liable and the surety was liable, despite the fact that the surety's liability cannot be greater than the principal's liability. Instead, the Third District held that if a party fails to raise a claim that a verdict is inconsistent, that issue has been waived. See id. at 611; see also Sunbank & Trust Co. of Brooksville v. Transcon. Ins. Co., 666 So. 2d 198, 199 (Fla. 5th DCA 1995) (not applying the "fundamental nature" exception to a "fatally" inconsistent verdict where the jury found that one of the defendants was not negligent and then determined that defendant's percentage of negligence to be twenty percent).

There is no other specific reason to apply a "fundamental nature" exception unique to products liability cases. While the defendants assert that products liability law dictates a different result, we have found no case that would require products liability cases to be treated in a different manner than other cases involving equally inconsistent verdicts.[1]

1. The cases mentioned in oral argument by the defendants do not support the argument that products liability law requires this "fundamental nature" exception. See Auburn Mach. Works Co., Inc. v. Jones, 366 So. 2d 1167, 1172 (Fla. 1979); West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80, 92 (Fla. 1976); Cassisi v. Maytag Co., 396 So. 2d 1140, 1144 (Fla. 1st DCA 1981); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 310 (Fla. 3d DCA 1967). These cases set forth the general principles addressing products liability claims and do not pertain

To the contrary, there may be a reason why juries in products liability cases have arrived at inconsistent verdicts. For example, in reaching its findings, the jury may have been confused about the jury instructions defining strict liability or may have believed, based on the instructions, that all it needed to do to hold the defendant liable was find either a design defect or negligent design.[2] The standard products liability jury instructions specifically direct that the jury should consider comparative negligence and damages if the jury finds either a design defect or negligent design. Yet, the possibility of juror confusion regarding the instructions

to inconsistent jury verdicts at all. See Auburn Mach. Works Co., 366 So. 2d at 1172 (holding that in products liability cases, the obviousness of a hazard is not an exception to a manufacturer's liability, but is a defense that a manufacturer can use to show a plaintiff did not exercise reasonable care based on the openness and obviousness of the danger); West, 336 So. 2d at 92 (holding that a manufacturer may be held liable under the theory of strict liability in tort where the manufacturer places a product on the market with a defect that causes an injury but, as a defense, the manufacturer can assert contributory negligence if based upon grounds other than a failure of the user to discover a defect in the product); Cassisi, 396 So. 2d at 1152 n.26 (same); Royal, 205 So. 2d at 310 (holding that a manufacturer does not breach its duty when it has supplied materials that are reasonably safe, even though the materials might conceivably be made more safe).

2. The possibility of an inconsistent verdict in this type of case, where both theories are presented to the jury, is actually referred to in the comments of Florida's Standard Jury Instructions—Product Liability: "In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict." Standard Jury Instructions—Civil Cases (No. 02-2), 872 So. 2d 893, 896 (Fla. 2004). This comment has remained unchanged in our recent opinion in In re Standard Jury Instructions in Civil Cases—Report No. 13-01 (Products Liab.), No. SC13-683, 2015 WL 1400770, at *6 (Fla. Mar. 26, 2015).

or the special verdicts is exactly what is recognized as the core of all inconsistent verdict cases.

In inconsistent verdict cases outside of the products liability context, if there has been no objection to the inconsistent verdict, appellate courts have held that any error in the inconsistent verdict is waived. In contrast, in this situation, the district courts in Tricam Industries, NACRA, and Nissan Motor erroneously determined that one portion of the inconsistent verdict represented an established fact that the jury found and then examined the evidence presented at trial to determine whether an independent basis existed for the conflicting verdict. By elevating one of the findings over the other inconsistent finding, the appellate courts failed to view all of the facts "in favor of the verdict." Thus, the "fundamental nature" exception has been applied in a contrary manner to the general legal principles discussed above. There is no principled basis for distinguishing products liability cases when it comes to inconsistent verdicts.

In conclusion, we reject a products liability "fundamental nature" exception that obviates the need for an objection before the jury is discharged. Any inconsistency in a verdict must be resolved by a jury—not a court attempting to guess the jury's intent. Thus, we further reject the Third District's determination, as well as the conclusions reached in NACRA and Nissan Motor, that the proper remedy in such a situation would be for a court to enter a judgment for the defense,

which is contrary to the jury's award of damages. Even in cases where there is a timely objection, if the jury is unable to resolve the inconsistency after being reinstructed, or if the trial court fails to re-submit the case to the jury, the remedy is not to enter a judgment but to order a new trial so a new jury can make the necessary findings to resolve the case. See, e.g., Southland Corp. v. Crane, 699 So. 2d 332, 334 (Fla. 5th DCA 1997) (requiring a new trial where the court discharged the jury after the objection to an inconsistent verdict).

In cases where no objection is raised, the remedy is certainly not to enter judgment in favor of a party who failed to timely object. This is especially true where the judgment is entered in a manner contrary to the jury's ultimate resolution, thus rewarding the non-objecting party for strategically remaining silent with the hope that a court will resolve the inconsistency in its favor. We therefore agree with Judge Schwartz's dissent below that "it is simply wrong for the court either here or in NACRA and [Nissan Motor], to resolve the acknowledged inconsistency itself, much less to do so in favor of the loser." Tricam Indus., 100 So. 3d at 116-17 (Schwartz, J., dissenting).

## III. Application of the Law to this Case

In this case, the jury received standard jury instructions on both negligence and strict liability contained in the approved standard jury instructions. The special interrogatory then instructed the jury to consider damages if its answer to either the

first question (design defect) or the second question (negligent design) was "yes." While the jury received standard jury instructions pertaining to products liability, it is certainly plausible that the jury was confused about the significance of its findings as to design defect under strict liability and negligent design. The jury could have determined that it needed only to return a verdict in favor of the plaintiff on one theory before proceeding to determine damages. Certainly, this is a logical explanation given that the jury also found that the decedent contributed to cause the accident, by finding the decedent 80% negligent, and then proceeded to award substantial damages for the losses sustained by the surviving daughter.

Although the defendants did not timely object and the trial court entered judgment for the plaintiff after reduction for comparative negligence, the defendants continue to argue that a judgment in their favor should have been entered. The Third District accepted this argument and concluded that, because the jury found "no design defect," the jury could not have also found "negligence" in the design. Tricam Indus., 100 So. 3d at 111. This is merely an inconsistent verdict, however, and the very nature of all inconsistent jury verdicts is that the jury's "finding" as to one part of the verdict is mutually exclusive with the other finding, thus making the jury's intent unclear.

Based on our holding in this case that a timely objection is required, we conclude that the objection to the inconsistent verdict was waived. The purpose in

requiring that an objection be voiced before the jury is discharged is so that any inconsistency in a verdict may be corrected by the jury. If the proper relief to an inconsistent verdict was always a new trial, thus not providing the jury with an opportunity to correct its own inconsistency, there would be no need to voice an objection prior to the jury's discharge. Further, both parties have recognized that if the objection were waived, reinstatement of the original judgment should be ordered.[3] Thus, we hold that the trial court did not err in denying the defendants' motion to set aside the verdict, as the defendants failed to timely raise the inconsistent verdict.

## CONCLUSION

For all these reasons, we hold that a timely objection is required to an inconsistent verdict in a civil case and disapprove the use of the "fundamental nature" exception to the general law pertaining to inconsistent verdicts as has been carved out for products liability cases. In circumstances involving an inconsistent verdict, a party is still obligated to object prior to the time that the jury is discharged so the parties and the trial court can consider whether the jury's confusion can be rectified through additional jury instructions or a new verdict

3. The defendants agree that, if the judgment in their favor is set aside, reentry of the original judgment, rather than a new trial, should be the remedy in this case.

form. If a party fails to timely object to an inconsistent verdict, that party waives the objection and unless there is no evidence to support one finding, the trial court may properly enter judgment pursuant to that verdict.

Our reaffirmation of the requirement of an objection serves numerous important policy concerns. First, the requirement of a timely objection discourages gamesmanship by precluding objections that a party sat on, in an effort to obtain a calculated benefit by raising it later. Second, our ruling enhances the efficiency of judicial proceedings, requiring the error to be raised immediately so that it can be rectified as soon as possible without increasing the likelihood that a new trial will be required. Third, the requirement of a timely objection promotes the sanctity of the jury verdict and permits a jury to correct a clearly erroneous verdict that may be based on some underlying confusion brought on by the parties, the court, or the jury instructions.

Accordingly, we quash the Third District's decision applying the "fundamental nature" exception in Tricam Industries and remand to the district court with instructions that the case be returned to the trial court for entry of the original judgment in favor of Coba. We further disapprove of the decisions in

NACRA, 480 So. 2d 669, and Nissan Motor, 891 So. 2d 4, because they are inconsistent with our holding.[4]

It is so ordered.

LABARGA, C.J., and LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Third District - Case No. 3D11-50

(Miami-Dade County)

Roy D. Wasson of Wasson & Associates, Chartered, Miami, Florida; and Orlando D. Cabeza of DeMahy Labrador Drake Victor Payne & Cabeza, P.A., Coral Gables, Florida,

for Petitioner

Jeffrey Arthur Mowers and Cindy Jane Mishcon of Lewis Brisbois Bisgaard & Smith LLP, Fort Lauderdale, Florida,

for Respondents

4. We decline to reach the other issues raised by Coba regarding alleged juror misconduct and various evidentiary issues, as these claims are beyond the scope of the conflict. See DK Arena, Inc. v. EB Acquisitions I, LLC, 112 So. 3d 85, 97 (Fla. 2013) (declining to address issues beyond the scope of the conflict on which this Court granted review).

# Perils Of An Inconsistent Verdict In Design Defect Cases



**Law360, New York (July 1, 2015, 10:40 AM ET) --**

**Brian Baggot**

On May 14, 2015, the Florida Supreme Court eliminated an important protection for product liability defendants in design defect cases that produce inconsistent jury verdicts. The court's decision in *Coba v. Tricam Industries Inc.*[1] jettisoned Florida's unique "fundamental nature" exception to the requirement that counsel must object to an inconsistent verdict before the jury is discharged. This article discusses the perils of inconsistent verdicts in product liability design defect cases and the strategies defense counsel of any jurisdiction can employ when confronting such perils.

In *Coba*, the plaintiff brought a wrongful death products liability action against the manufacturer of an aluminum ladder. The case went to the jury on two theories: strict liability for a design defect and negligence for the failure to design the ladder in a reasonably safe condition.[2] At the conclusion of the evidence, the trial court authored a verdict form for the jury to use in deliberations.[3] The following reflects the jury's key entries on the verdict form in *Coba*:

1. Did Defendants place the ladder on the market with a design defect, which was a legal cause of Roberto Coba's death?

   YES _____ NO __X__

2. Was there negligence on the part of Defendants which was a legal cause of Roberto Coba's death?

   YES __X__ NO _____

After entering their conclusions on the verdict form, the *Coba* jury returned a seven-figure award and they were discharged by the court without objection from defense counsel.[4] The manufacturer-defendant subsequently filed a motion to set aside the verdict.[5] The manufacturer argued that the jury's finding of negligence was fundamentally inconsistent with its conclusion that there was no design defect.[6]

The appellate court agreed and granted the manufacturer's motion. The appellate court acknowledged the general rule that a party waives an objection to an inconsistent verdict if it fails to raise the issue before the jury is released.[7] However, the court applied a common law exception adopted by other Florida appellate districts in cases where the verdict inconsistency was "of a fundamental nature."[8] The appellate court determined this exception was present in *Coba* because the plaintiff had limited its trial presentation solely to a purported design defect.[9] Thus, when the jury found no evidence of a design defect, the inconsistent finding of negligence was fundamentally unsupportable. The appellate court concluded that the failure to contemporaneously object did not waive the right to challenge a verdict inconsistency of such a fundamental nature.[10] The court then resolved the inconsistency in favor of the defense rather than remanding the case for a new trial. The court reasoned that because the plaintiff only put on evidence of a design defect, the jury's failure to find a defect meant "there was no evidence to support any other cause of action [and] no issue to be resolved on remand."[11]

The Florida Supreme Court overturned the appellate court and held that there is no "fundamental nature" exception to the waiver that occurs when the defendant fails to object to an to an inconsistent verdict before the jury is discharged.[12] The Supreme Court determined that a "fundamental nature" exception in products liability cases is "at odds with the ... policy reasons undergirding the requirement of timely objection, including upholding the sanctity of the jury's role in trial, preventing strategic gamesmanship and increasing judicial efficiency."[13]

In part, the Supreme Court based its ruling on a desire to prevent defense counsel from "strategically sitting on the objection until after the jury is no longer available to correct its decision."[14] The court ignored however, the strategic practice by which plaintiffs' counsel present superfluous liability theories in design defect cases to emphasize multiple grounds for recovery on the verdict form despite the risk of inconsistent verdicts.[15] Such tactic may involve a wager that the defense will not recognize the problem in the frenetic moments between verdict announcement and jury discharge in order to timely object.[16]

Moreover, trial is a considerable interruption to the personal lives of the jurors and when the verdict is announced, a powerful momentum arises to terminate their service and swiftly return them to their real lives. In this atmosphere, there is a clear disincentive for defense counsel to demand the jury return to deliberations to reconsider a verdict in which they have already signaled some partial favor for the plaintiff's case. When a judge requires a jury to reconsider their verdict, they are not bound by former conclusions on the verdict form and they are free to comprehensively review the case and bring an entirely new verdict.[17] In such a situation, defense counsel certainly risks jury reprisal by impeding the conclusion of their service and obligating them to reconsider a verdict inconsistency.[18]

With these considerations in mind, the following strategies should be employed by defense counsel of any jurisdiction when confronting the perils of an inconsistent verdict (regardless of the cause of action):

- First, defense counsel must be cautious about special verdict forms especially where authored by opposing counsel or the judge. The popularity of special verdict forms with multiple interrogatories continues to grow in modern litigation.[19] However, the increased use of such forms comes with an attendant rise in the risk of the jury issuing inconsistent answers to the interrogatories.[20] For example, on the *Coba* verdict form, the first interrogatory unwisely asked the strict liability question without reference to the "unreasonably dangerous" terminology which defines product defectiveness in Florida.[21] Had such terminology been included in the first interrogatory, the *Coba* verdict form might have emphasized to the jury that they needed to consistently answer the second interrogatory as to negligence. Additionally, the *Coba* verdict form needlessly prompted the jury to proceed to the second interrogatory about negligence even if they did not find an actionable design defect in the first. Considering the case presented at trial, the form should have directed the jury to proceed no further if they gave a negative response to the first interrogatory.[22] The bottom line is that defense counsel must closely examine draft verdict forms for the potential of inconsistent jury conclusions considering the associated jury instructions and the evidence proffered by the plaintiff during trial.

- In light of the frenzied atmosphere that typically unfolds at the announcement of the verdict, defense counsel must take advantage of the opportunity to be more deliberative in evaluating the draft verdict form when it's litigated in relative repose earlier in the trial. At that time, defense counsel should also be unsparing in raising

appropriate objections to the substance of verdict form entries drafted by the court or opposing counsel. Pertinent objections to the verdict form have the capacity to also preserve an appellate challenge to a subsequent inconsistent verdict by the jury.[23]

- When there is a prospect of an inconsistent verdict, advance efforts must be made with the judge to:

    - avoid a post-verdict environment in which defense counsel must precipitately evaluate the presence of a verdict inconsistency; and
    - 
    - mitigate the aggravation of jurors should they be required to return to deliberations to resolve an inconsistency.

  Examples of such advance efforts include: (a) avoiding scenarios where the jury enters deliberations likely to culminate at the close of business or the end of the work week, (b) asking the judge to affirmatively warn jurors in the instructions that they may have additional post-verdict responsibilities (or at a minimum, asking the judge and opposing counsel to refrain from comments to the jury which create an expectation that their work is concluded the moment they announce a verdict) and, (c) a preemptive request to the judge — before jury deliberations — that counsel receive a sufficient moment, outside the presence of the jury, to consider any verdict inconsistency before jury discharge.

- Once the verdict form is provided to the jury, defense counsel must anticipate the scenarios that could result in an inconsistent verdict no matter how theoretical. Questions raised by the jury about the form during deliberations must be scrutinized for signs of a looming inconsistent decision. Defense counsel should use the time during jury deliberations to research the standard applicable to the possible verdict inconsistencies and to formulate the objections and arguments to be made before jurors are discharged.

- If the jury is discharged without defense objection, there is still the possibility of a motion for judgment in favor of the defense notwithstanding the verdict ("motion for JNOV").[24]

- For example, before the jury ever receives the case, it is now a standard practice for defense counsel to move for directed verdict arguing that the plaintiff's evidence was insufficient to give the case to the jury.[25][26]

- When a verdict inconsistency is then recognized only after the jury is discharged, defense counsel should consider whether such inconsistency illustrates, in and of itself, the absence of sufficient evidence to support that portion of the verdict which favored the plaintiff. A motion for JNOV is appropriate in cases where the reasonable jury could not render the plaintiff's verdict based on the evidence introduced at trial.[27] Therefore, provided the defense made the standard motion for directed verdict at the close of the plaintiff's case, there remains a post-trial JNOV attack[28] on an inconsistent verdict on grounds that the contradiction manifests a lack of evidence to legally support that portion of the verdict for the plaintiff.[29] Such grounds are preserved even where defendant waived the inconsistent verdict objection.[30]

A difficult predicament arises for defense counsel when the perils of an inconsistent verdict arise at trial. For the products liability defense attorney, this is most likely to occur in the design defect case where the plaintiff needlessly presents both strict liability and negligence claims as to the same defect theory. As a result of the Coba decision, Florida now joins other jurisdictions which require the defense to object before jury discharge in order to make an appellate challenge to an inconsistent verdict. However, by employing the strategies discussed above, defense counsel can minimize the dilemmas resulting from this requirement and perhaps transfer back to the plaintiff the risk of post-trial consequences of the inconsistent verdict.

—By Brian J. Baggot, Rumberger Kirk & Caldwell PA

*Brian Baggot is a partner in Rumberger Kirk & Caldwell's Tampa, Florida, office and is a former military prosecutor in the U.S. Army Judge Advocate General's Corps.*

[1] 40 Fla. L. Weekly S257a (Fla. May 14, 2015).
[2] *Tricam Industries Inc. v. Coba*, 100 So. 3d 105, 108 (Fla. 3d DCA 2012)
[3] *Coba*, 40 Fla. L. Weekly S257a. at *3
[4] *Id*.
[5] In Florida, an inconsistent verdict occurs "Where the findings of a jury's verdict in two or more respects are ... such that both cannot be true and therefore stand at the same time ..." *See id*. at * 6 quoting *Crawford v. DiMicco*, 216 So. 2d 769, 771 (Fla. 4th DCA 1968).
[6] *Tricam Industries Inc. v. Coba*, 100 So. 3d at 108.
[7] *Id*. at 108-09.
[8] *Id*.
[9] *Id*. at 110-11.
[10] *Id*.
[11] *Id*. at 108-09.
[12] *Coba*, 40 Fla. L. Weekly S257a. at *1
[13] *Id*. at *8.
[14] *Id*. at *7.
[15] A growing number of courts and commentators have found that, in cases in which the plaintiff's injury is caused by an alleged defect in the design of a product, there is no practical difference between theories of negligence and strict liability. *Ackerman v. Am. Cyanamid Co*., 586 N.W.2d 208, 220 (Iowa 1998). There is certainly support for this perception in Florida. *See Husky Industries Inc. v. Black*, 434 So. 2d 988, 991 (Fla. 4th DCA 1983) ("A defectively designed product is one that has been negligently designed.") It is likewise a common perception in other jurisdictions, some of which prohibit a design defect theory going to the jury on both negligence and strict liability theories. *See Gauthier v. AMF Inc.*, 788 F.2d 634, 637 (9th Cir. 1986) ("There is no practical difference between strict liability and negligence in defective design cases ..."); *Jones v. Hutchinson Manufacturing Inc.*, 502 S.W.2d 66, 69-70 (Ky. 1973) (finding no difference between standards of conduct under strict liability and negligence in design defect case). *See* generally David Owen, Products Liability Law Restated, 49 S.C. L.Rev. 273, 286 (1998) ("It long has been an open secret that, while purporting to apply 'strict' liability doctrine to design ... cases, courts in fact have been applying principles that look remarkably like negligence.")
[16] Indeed, Florida case law prior to *Coba*, demonstrates the difficulty of rapidly analyzing the presence of a verdict inconsistency at the culmination of trial and the jury's release. For example, *see Simpson v. Stone*, 662 So.2d 959, 961-962 (Fla. 5th DCA 1995) (Recognizing the unfairness of finding a party waived the right to challenge an inadequate verdict considering, "the lack of clarity in the existing case law" for distinguishing a verdict

inconsistency requiring contemporaneous objection versus a verdict inadequacy which does not).

[17] *Morton Roofing Inc. v. Prather*, 864 So. 2d 64, 66 (Fla. 5th DCA 2003) quoting Tobin v. Garry, 127 So. 2d 698 (Fla. 2d DCA 1961). *See also Stevens Markets Inc. v. Markantonatos*, 189 So.2d 624, 626 (Fla. 1966) (When a verdict is returned for correction, the jury may alter it in substance or submit a different verdict because, "Until a verdict is accepted by the court, the entire cause remains in the hands of the jury").

[18] For example, *see C.G. Chase Construction v. Colon*, 755 So. 2d 1144 (Fla. 3d DCA 1998) (Court recognizes that a party seeking the jury's reconsideration of an inconsistent verdict "naturally risk[s] having the award unfavorably adjusted.")

[19] *See Butz v. Werner*, 438 N.W.2d 509, 520 (N.D. 1989) (Vande Walle, J., concurring)

[20] Id.

[21] *See Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143-44 (Fla. 1st DCA 1981) (Submissible products liability case requires the product be in a defective condition unreasonably dangerous to the user). *See also* Fla. Standard Jury Instruction (Civil) No. 403.7b ("A product is defective because of design if it is in a condition unreasonable dangerous to the user ...") (emphasis added) (internal citations omitted).

[22] *See Coba*, 100 So. 3d at 111.

[23] *See Spitz v. Prudential-Bache Securities Inc.*, 549 So.2d 777, 778 (Fla. 4th DCA 1989) (Finding that a challenge to the jury's inconsistent verdict was preserved where the objecting party "clearly objected both at the time the verdict form was first presented to the judge for consideration and again during the jury's deliberations when the jury presented a question to the judge as to the form of verdict"); *Chabad House-Lubavitch of Palm Beach County v. Banks*, 602 So. 2d 670, 672 (Fla. 4th DCA 1992) (A party preserved its objection to an inconsistent verdict where among other things, it raised concerns about the verdict form during the charge conference). *See also, Buchwald v. Renco Group*, No. 13-cv-7948 (AJN), March 4, 2015 (S.D.N.Y.) (An objection asserting that a special verdict raises the possibility of an inconsistent verdict is preserved when made before the jury has retired to deliberate) citing *Cash v. County of Erie*, 654 F.3d 324, 340 (2d Cir.2011).

[24] "JNOV" is an acronym for "judgmentnon obstante veredicto," the Latin term for "judgment notwithstanding the verdict."

[25] *See Galloway v. U.S.,* 319 U.S. 372, 405, 63 S.Ct. 1077, 1094 - 1095 (1943) ("[T]he motion for directed verdict has become routine" for defendants in civil litigation); *See also, W. B. D. Inc. v. Howard Johnson Co.*, 382 So.2d 1323, 1325 (Fla. 1st DCA 1980) (Labeling the request for directed verdict as "the usual" defense motion "at the conclusion of the plaintiffs' case").

[26] “Motion for directed verdict,” refers to the defense motion at the conclusion of a plaintiff’s case seeking a legal ruling that the evidence does not demonstrate an issue for a jury to try. *See Meus v. Eagle Family Discount Stores Inc.*, 499 So.2d 840, 841 (Fla. 3d DCA 1986) (“Like its pretrial counterpart — the summary judgment — the directed verdict is a ruling that a reasonable-minded jury could not differ as to the existence of a material fact, that therefore, no factual determination is required and, that judgment must be entered for the movant as a matter of law”). The “directed verdict” terminology stems from the now obsolete practice whereby a trial court “directed” the jury, through an instruction or charge, to return a specific verdict because the court had decided the outcome of the trial could not possibly be a matter of dispute among the jurors. *Id*. citing Origin and Development of The Directed Verdict, 48 Mich.L.Rev. 555, 589 (1950).

[27] *See New Jerusalem Church of God Inc. v. Sneads Community Church, Inc.*, 147 So. 3d 25, 28 (Fla. 1st DCA 2013).

[28] Although the term “motion for a judgment notwithstanding the verdict” is still employed, a motion challenging a jury verdict is often styled today as a “motion for judgment in accordance with a prior motion for directed verdict.” *See Fire & Casualty Insurance Co. v. Sealey*, 810 So.2d 988, 991 (Fla. 1st DCA 2002).

[29] For example, *see Williams v. Hines*, 80 Fla. 690, 86 So. 695 (Fla. 1920). In *Williams*, a train passenger sued a railroad employee alleging that the employee’s negligence caused the plaintiff physical injury. *Id*. The plaintiff also sued the railroad for vicarious liability under the respondeat superior doctrine. *Id*. at 696-697. The jury returned an inconsistent verdict which exonerated the employee but imposed liability on the employer. *Id*. at 695. The Florida Supreme Court affirmed the trial court’s decision to grant the railroad’s motion for judgment JNOV. *Id*. at 702. The Supreme Court reasoned that there was no basis for a verdict against the master where, based on the evidence before them, the jury exonerated the servant. *Id*.

[30] *Coba*, 40 Fla. L. Weekly S257a. at *8 and *12 (The trial court may properly enter judgment pursuant to an inconsistent verdict where there was no timely objection “unless there is no evidence to support one finding over another”). The genesis of such principle may be the common law dictum holding that, where proven facts give equal support to two inconsistent hypotheses, then neither of them are established and the judgment must go against the party having the burden of proof. *See In re Estate of Severns*, 352 N.W.2d 865, 870 (Neb. 1984); *Lisa-Jet Inc. v. Duncan Aviation Inc.*, 569 F.2d 1044, 1048 (D. Neb. 1978); *New York Life Insurance Co. v. Prejean*, 149 F.2d 114, 116 (5th Cir. 1945).

To: Rebecca Mercier Vargas, Chair

From: Alan Wagner

Re: Product Liability Sub-committee

The Products liability sub-committee met by telephone on February 17, 2016 to discuss issues raise by the Supreme Court's decision Aubin disapproving of the Third Restatement of Torts risk/utility test and its definition of a design product defect incorporating the need to prove a reasonable alternative design. Aubin v. Union Carbide Corp. 177 So.3d 489 (Fla 2015). In attendance were Alan Wagner, Rebecca Vargas, Jack Day, Laura Whitmore, Dan Rogers, Gary Fox, and Jeff Cohen.

The sub-committee discussed several issues, which are set forth below:

1. **Does the risk/utility test survive Aubin as a means to prove product design defect?**

In Aubin, the Court clearly reaffirmed its decade's old West v. Caterpillar Tractor decision adopting section 402A of the Second Restatement of Torts and rejected the Third Restatement's risk utility test and establishment of a reasonable alternative design mandate. At first blush, it would seem that risk/utility should be removed entirely from jury instruction 403.7 and the definition of design defect. The alternative view, however, points to the Aubin Court: a) making reference to the newly approved products liability instruction; b) expressly not directing a change to the instruction; c) referring to the risk/utility test as an "alternative definition; and, d) explaining that both plaintiffs and defendants can use the test and the presence or absence of a reasonable alternative design at trial.

The issue then becomes whether the risk/utility test remains as an *alternative* method available to the plaintiff to prove product design defect. We are also left with the Court's language that permits the use of the risk/utility test by the defendant as a defense when coupled with proof that there is no reasonable alternative design – the classic 402A comment k cases (such as the polio vaccine). The important portions of the opinion that create the tension between dumping the risk/utility test from product altogether or keeping it as an alternative method to prove defect is as follows:

> While we conclude that the Third Restatement's risk utility test and establishment of a reasonable alternative design mandate are not requirements for finding strict liability, we note that nothing precludes the plaintiff in proving his or her case from showing that alternative safer designs exist—or for that matter precludes the defendant from showing that it could not have

made the product any safer through reasonable alternative designs. The Third Restatement, while rejecting the consumer expectations test as an independent basis for defining strict liability design defect, also provides that a "broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe under this provision, including, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing." Am. L. Prod. Liab. 3d § 28:3. In this regard, we conclude—as did the Supreme Courts of Kansas, Pennsylvania, and Wisconsin—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. *See Delaney*, 999 P.2d at 944; *Tincher*, 104 A.3d at 397; *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 319 Wis.2d 91, 768 N.W.2d 674, 686 (2009).

* * *

In fact, the jury instructions approved by this Court use both the consumer expectations test and risk utility test as alternative definitions of design defect. *See In re Std. Jury Instr. in Civ. Cases—Report No. 13–01,* 160 So.3d 869, 871 (Fla.2015). These alternative definitions have been in effect for over two decades after the Court directed the Committee on Standard Jury Instructions to improve its products liability instructions. *See Ford Motor Co.*, 404 So.2d at 1052 n. 4. Significantly, however, there is absolutely no requirement embodied in the Standard Jury Instructions, nor has this Court ever adopted a requirement as set forth in the Third Restatement, that the plaintiff must either present proof of a reasonable alternative design or establish that the product was manifestly unreasonable before the requirement of proof of an alternative design could be excused. We do not direct, at this point, whether the standard jury instructions should be modified in light of this opinion. The parties may, in proving or defending against such claims, present evidence that a reasonable alternative design existed and argue whether the benefit of the product's

> design outweighed any risks of injury or death caused by the design.
>
> Consistent with our decision in *West*, we approve the portion of *McConnell* that applied the Second Restatement, including its holding that correctly focused on the consumer expectations test. We decline to recede from our precedent in *West* and thus disapprove of the Third District's decisions in *Aubin*, *Kohler*, and *Agrofollajes*, which adopted and applied the Third Restatement.

The sub-committee could not come to a consensus on the issue and tabled the matter for discussion with the full CJI committee. Proposed 403.7 instructions both eliminating and retaining the risk/utility test as a means to prove a design defect are attached. The issue also bleeds over into 403.15 (Issues on Main Claim). Alternative revisions to that instruction are attached as well.

2. There is a note change to 403.8 (strict Liability Failure to Warn) to reference the Aubin decision.

3. The learned intermediary defense was also a feature of the Aubin decision and the sub-committee has drafted a new defense issue and added it to 403.18. A red-lined copy of the proposed instruction is attached.

4. We have also altered the risk/benefit defense in recognition of the Court's language allowing a defendant to use the risk/utility defense when it is also able to demonstrate that no reasonable alternative design existed. That change is also in the attached red-lined edits to 403.18

RETAINS Risk/Utility

## 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 is not required to prove a design defect. *Aubin v. Union Carbide Corporation*, 97 So.3d 489 (Fla. 2015). Pending further developments in the law, the committee takes no position on whether the risk/utility test is available as an alternative method of proving product defect. See, Aubin, 177 So.3d at 512. ~~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.~~

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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~~

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~~note 3, pending further development in the law, the committee takes no position on this issue.~~

~~3~~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 *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).

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

NOTES ON USE FOR 403.7

1. The risk/benefit test is not required to prove a design defect. *Aubin v. Union Carbide Corporation*, 97 So.3d 489 (Fla. 2015). Pending further developments in the law, the committee takes no position on whether the risk/utility test is available as an alternative method of proving product defect. See, Aubin, 177 So.3d at 512.

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. 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. 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).

Eliminates Risk/Utility

## 403.7 STRICT LIABILITY

**a. Manufacturing defect**

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**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**

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**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 or design defect. See Aubin v. Union Carbide Corporation, 177 So.3d 489 (Fla 2015); *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 *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).

## 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.**

NOTES ON USE FOR 403.7

1. The risk/benefit test does not apply in cases involving claims of manufacturing or design defect. See Aubin v. Union Carbide Corporation, 177 So.3d 489 (Fla 2015); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language "a person in the vicinity of the product" instead of "the user." Strict liability does not depend on whether the defendant foresaw the particular bystander's presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) ("Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the

disappearing privity requirement."). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

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.*,*Co nsolidated 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. 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).

## 403.8 STRICT LIABILITY FAILURE TO WARN

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

NOTES ON USE FOR
403.8

1. The following cases recognize strict liability for a failure to warn of defects. Aubin v. *Union Carbide Corp.* *177 So.3d 489 (Fla. 2015)* ~~*v. Aubin*, 97 So.3d 886, 898 (Fla. 3d DCA 2012)~~; *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

Retains Risk/Utility

## 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. The risk/benefit test is not required to prove a design defect. *Aubin v. Union Carbide Corporation*, 97 So.3d 489 (Fla. 2015). Pending further developments in the law, the committee takes no position on whether the risk/utility test is available as an alternative method of proving product defect. See, Aubin, 177 So.3d at 512. ~~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.~~

Eliminates Risk/Utility

## 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 when there is no reasonable alternative design:*

**whether, there is no reasonable alternative design for (the product) and, on balance, the [benefits] [or] [value] of** (the product) **outweigh the risks or danger connected with its use.**

NOTE ON USE FOR 403.18b

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test when there is no reasonable alternative design for the product. *Aubin v. Union Carbide Corp.177 So.3d 489, 511 (Fla. 2015);* 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); RESTATEMENT (SECOND) TORTS, § 402A, comment k (unavoidably unsafe products). ~~*Cassisi v. Maytag Co.*, 396 So.2d 1140, 114546 (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~~

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~~both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.~~

*c. Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

*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.

*f. 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 shall 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 403.18f

See, Aubin v. Union Carbide Corp. 177 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.

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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).

## 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 is not required to prove a design defect. *Aubin v. Union Carbide Corporation*, 97 So.3d 489 (Fla. 2015). Pending further developments in the law, the committee takes no position on whether the risk/utility test is available as an alternative method of proving product defect. See, Aubin, 177 So.3d at 512. ~~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.~~

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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~~

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~~note 3, pending further development in the law, the committee takes no position on this issue.~~

3~~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 *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).

## 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 or design defect. See Aubin v. Union Carbide Corporation, 177 So.3d 489 (Fla 2015); *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 *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).

## 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. The risk/benefit test is not required to prove a design defect. *Aubin v. Union Carbide Corporation*, 97 So.3d 489 (Fla. 2015). Pending further developments in the law, the committee takes no position on whether the risk/utility test is available as an alternative method of proving product defect. See, Aubin, 177 So.3d at 512. ~~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.~~

## 403.15 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.~~

## 403.8 STRICT LIABILITY FAILURE TO WARN

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

NOTES ON USE FOR
403.8

1. The following cases recognize strict liability for a failure to warn of defects. Aubin v. *Union Carbide Corp.* *177 So.3d 489 (Fla. 2015)* ~~*v. Aubin*, 97 So.3d 886, 898 (Fla. 3d DCA 2012)~~; *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

## 403.18 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 when there is no reasonable alternative design:*

**whether, there is no reasonable alternative design for (the product) and, on balance, the [benefits] [or] [value] of** (the product) **outweigh the risks or danger connected with its use.**

NOTE ON USE FOR 403.18b

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test when there is no reasonable alternative design for the product. *Aubin v. Union Carbide Corp.177 So.3d 489, 511 (Fla. 2015);* 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); RESTATEMENT (SECOND) TORTS, § 402A, comment k (unavoidably unsafe products). ~~*Cassisi v. Maytag Co*., 396 So.2d 1140, 114546 (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~~

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~~both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.~~

*c. Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

*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.

*f. 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 shall 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 403.18f

See, Aubin v. Union Carbide Corp. 177 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.

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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).

**From:** Alan Wagner [mailto:alanwagner@wagnerlaw.com]
**Sent:** Tuesday, July 12, 2016 12:25 PM
**To:** Telfer, Heather <HTelfer@floridabar.org>
**Subject:** 403.18 change

Heather – for the meeting materials, here is the issue we discussed on the 403.18 instruction that was approved by the committee at the last meeting.

As it stands now, 403.18 states in relevant part as follows:

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]:

b. Unavoidably Unsafe Product:

whether, there **is** no reasonable alternative design for (the product) and, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.

We used and approved the present tense in the instruction, but the subcommittee has concluded that the proper question should be phrased in the past tense. After all, if at the time a product is designed there is no reasonable alternative design, the product is manufactured and then sold, but an alternative design is developed after that time shouldn't the unavoidably unsafe defense "win?" If the product was not defective because there was no alternative design (and benefits outweighed the risk of use) the product would not suddenly become defective and subject the designer to liability just because there was a scientific advance.

As re-edited, the defense should read as follows (with the changes noted in red):

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]:

b. Unavoidably Unsafe Product:

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) outweigh the risks or danger connected with its use.

Alan F. Wagner
Wagner McLaughlin, P.A.
601 Bayshore Blvd.
Suite 910
Tampa, Florida 33606
813-225-4000
www.WagnerLaw.com

**From:** Alan Wagner [mailto:alanwagner@wagnerlaw.com]
**Sent:** Tuesday, July 12, 2016 1:15 PM
**To:** 'Wagner McLaughlin, P.A.' <firm@wagnerlaw.com>; Telfer, Heather <HTelfer@floridabar.org>; bbaggot@rumberger.com; jacohen@cfjblaw.com; Fox, Gary <gfox@stfblaw.com>; Rogers, Daniel <drogers@shb.com>; david@salesappeals.com; Slater, Thomas <tom@pajcic.com>; lwhitmore@shb.com; 'Rebecca Mercier-Vargas' <RVargas@kwcvpa.com>; JDay@jud6.org; Brannock, Steven <sbrannock@bhappeals.com>
**Cc:** sporter@rumberger.com
**Subject:** Products liability -- Model Jury Instructions and Verdict Form

I have attached a New Model Instruction 7 which also incorporates a model verdict form. I believe this captures our consensus from today's meeting.

The changes:

1. Fixed the title of the form so that aggravation of pre-existing injury is not referenced as a defense.

2. Removed the footnotes about the risk utility test as an alternative method to prove defect and moves that notation to a note on use.

3. Added to a reference about comment k and the unavoidably unsafe product defense. I am not sure I like the notes reference to the comment k defense, since it is really just a note that more instructions are required if other defenses are raised – which, after all is always the case (and we make no reference to other defenses).

4. Revised 403.19 to incorporate the "you attribute to each of them" language that was approved by the committee but which has not yet been published. I note that what has been approved is only a change to 401.21 (negligence). There has been no similar change approved for 403.19 (products liability). We should probably address this issue with the entire committee.

5. Removed the unavoidably unsafe product defense entirely from the model instruction and verdict form.

6. Returned the verdict form question regarding defect to the format of the original model instruction.

If I missed something, please let me know.

Thanks for everyone's participation today and for rearranging your schedules to participate on such short notice.

Alan

Alan F. Wagner
Wagner McLaughlin, P.A.
601 Bayshore Blvd.
Suite 910
Tampa, Florida 33606
813-225-4000
www.WagnerLaw.com

## MODEL INSTRUCTION NO. 7

### 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. At the time of the accident, Driver was operating the hay baler 10 miles per hour over the posted speed limit when the bolt suddenly broke, making it impossible for Driver to steer the baler, which crashed into the car being driven by 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. The defendants denied liability, and affirmatively alleged that Smith had been comparatively negligent. The defendants also allege that some of Smith's injuries pre-existed the collision with the hay baler and Smith alleges 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 the hay baler designed by Mishap and sold by Sharp was defective and that the defect in the hay baler caused him harm.**

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

**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] 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.**

**[403.15e] 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.**

**[403.19] 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 attributed to by each defendant.**

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

**2. Did defendants Mishap Manufacturing Co. and 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 and 2 are 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 answer to either question 1 or 2 is YES, answer question 3**

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

**YES _____ NO _____**

**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 questions 2 _____%**

**Plaintiff, John Smith (fill in only if you answered YES to question 3) _____ %**

**Total must be 100%**

**Please answer question 5.**

**6. What is the total amount (100%) of any damages sustained**

**by plaintiff, John Smith, and caused by the incident in question?**

**Total damages of plaintiff, John Smith $ _____**

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

**SO SAY WE ALL, this _____ day of _____ , 20___.**

_____

**FOREPERSON**

NOTES ON USE

1. 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).

## MODEL INSTRUCTION NO. 7

**Strict Product liability and negligence case,
with defenses of comparative negligence,
unavoidable unsafe product, and
aggravation of pre-existing injury**

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler being driven by Dilbert Driver struck him. The hay baler suddenly swerved across the road into the path of Smith, who was driving in the opposite direction. At the time, Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. An examination of the hay baler revealed that 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. At the time of the accident, Driver was operating the hay baler 10 miles per hour over the posted speed limit when the bolt suddenly broke, making it impossible for Driver to steer the baler, which crashed into the car being drivedn by 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 The defendants denied liability, and affirmatively alleged that Smith had been comparatively negligent. Defendants Milshap and Sharp also affirmatively alleged that there was no reasonable alternative design for the steering mechanism of the hay baler and that the benefits of the hay baler outweighed the risks or danger connected with its use. The defendants also allege that some of Smith's injuries per-existed the collision with the hay baler and Smith alleges 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 the hay baler designed by Mishap and sold by Sharp was defective and that the defect in the hay baler caused him harm.**

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

**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] 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.[1]**

**[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.**

**[403.15e] 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[2] 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.**

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[1] The plaintiff may elect to also add the phrase "or the risk of danger in the design outweighs the benefits" if he or she wishes to assume the burden of prof in that respect and to prove product defect in this alternative manner**".**

[2] The plaintiff may elect to also add the phrase "or the risk of danger in the design outweighs the benefits" if he or she wishes to assume the burden of prof in that respect and to prove product defect in this alternative manner**".**

**[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 defense raised by Mishap and Sharp, the issue for you to decide is whether, there is no reasonable alternative design for the hay baler and, on balance, the benefits or value of the hay baler outweigh the risks or danger connected with its use.**

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

**If, however, the greater weight of the evidence shows that both John Smith and one or more of the defendants were negligent or responsible and that the negligence or responsibility of each contributed as a legal cause of loss, injury or damage sustained by John Smith, you should decide and write on the verdict form what percentage of the total negligence or responsibility of all parties to this action was caused by each of them.**

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

**[501.2a] Any bodily injury sustained by John Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact**

**standard for measuring such damage. The amount should be fair and just in the light of the evidence.**

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

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

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

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

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

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

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

**[501.6] If the greater weight of the evidence shows that John Smith has**

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

**[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

**The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate John Smith for these losses as they are actually experienced in future years.**

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

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

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

**[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the**

**witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.**

**[601.2b] Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.**

**[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against Dilbert Driver. The second is the negligence claims against Mishap Manufacturing Company and Sharp Sales Company. The third is the product defect claims against Mishap Manufacturing Company and Sharp Sales Company. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.**

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

***Following Closing Arguments, the final instructions are given:***

**[700] Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. Before you do so, I have a few last instructions for you.**

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

**listen to, or watch any news accounts of this trial.**

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

**If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.**

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

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

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

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

**Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in**

**reaching your decision in this case.**

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

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

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

**[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.**

**From:** Alan Wagner [mailto:alanwagner@wagnerlaw.com]
**Sent:** Tuesday, February 07, 2017 2:47 PM
**To:** Telfer, Heather <HTelfer@floridabar.org>; 'Brian Baggot' <bbaggot@rumberger.com>; Rogers, Daniel <drogers@shb.com>; 'David Sales' <david@salesappeals.com>; Fox, Gary <gfox@stfblaw.com>; 'Jack Day' <jackday@jud6.org>; 'Jeffrey Cohen' <jacohen@cfjblaw.com>; 'Laura Whitmore' <lwhitmore@shb.com>; 'Rebecca Mercier-Vargas' <RVargas@kwcvpa.com>; Slater, Thomas <tom@pajcic.com>
**Subject:** RE: SJI Civil - Products Liability -- Meeting Summary

I thought I would briefly summarize the results of the subcommittee meeting last week and have done that below. Separate e-mails will circulate the changes we discussed and agreed upon for final approval.

We agreed as follows:

1. Ourland letter issue #1: Mr. Ourland suggests a note on use to clarify that the plaintiff, at his/her choice, may prove a defect by either the consumer expectation or risk utility tests. We decided that a note on use was unnecessary because the brackets in the instruction and the citation to Aubin make his point clear already.

2. Ourland issue #2: We agreed that there was no support in Florida law for extending comment k beyond drugs or medical devices; however, there does not appear to be any case law that would limit comment k to only drugs or medical devices. It appears to be uncharted territory – the risk being that every case could become a reasonable alternative design Restatement Third case simply by an appeal to the "unavoidable unsafe product defense. We decided to create a note on use to point out that comment k had only been thus far applied in drug and medical device cases and express no opinion as to whether it would be appropriate to apply the defense to any other class of products.

3. Littky-Rubin issue #1: Julie suggests that the consumer expectation test should apply not only to defective design cases but also to defective manufacturing cases. Aubin, however, dealt only with instances of defective design and there was nothing in the opinion that suggests that the test should be applied to manufacturing defect cases.

4. Littky-Rubin issue #2: We rejected the suggestion that the warnings instruction be altered.

5. Littky-Rubin issue #3: The third issue dealt with the reference to "substantial change" and sought some clarification; however, Aubin does not address this issue and we were unaware of any case that described or defined what is meant by "substantial change." We declined to change any of the instructions dealing with this issue and did not feel that any changes were warranted or needed.

6. Littky-Rubin issue #4: Julie next raised the governmental rules defense and state of the art defense (768.1257), noting that we did not have a governmental rules

defense and suggested that we should not have a state of the art defense either. We agreed that there was no government rules defense because it was drafted as an evidentiary "bursting bubble" presumption that would be inappropriate for a jury instruction. We did agree, though, that the state of the art defense was not a defense and that the statute only instructed the jury to consider certain things in deciding whether a product was defective. We agreed that the instruction should be moved from the "defenses" portion of the instructions and moved and bracketed to the end of 403.7 where defect is defined.

7. Littky-Rubin issue #5. We discussed the various changes suggested for the model instructions which, in the main, added issues and defenses to the model instruction and verdict form. We agreed that the model instruction was designed for the less sophisticated trial lawyer to serve as a guide and that, to that end, it would be most helpful to the practitioner to see a simple, straight-forward strict liability case and how it would interact with your routine negligence case. We agreed that further complicating the model would not be useful to those that typically rely on the model instruction in drafting instructions and verdict forms. Julie did suggest some grammatical changes and clarifications which were helpful and which will be incorporated into the model instruction.

I believe this summarizes the meeting. If I left anything out or made an error, please let me know.

The changes to the state of the art "defense," note on use for comment k unavoidable unsafe products, and revised model instruction will be circulated be separate emails.

Alan

Alan F. Wagner
Wagner McLaughlin, P.A.
601 Bayshore Blvd.
Suite 910
Tampa, Florida 33606
813-225-4000
www.WagnerLaw.com

**From:** Alan Wagner [mailto:alanwagner@wagnerlaw.com]
**Sent:** Tuesday, February 07, 2017 2:47 PM
**To:** Telfer, Heather <HTelfer@floridabar.org>; 'Brian Baggot' <bbaggot@rumberger.com>; Rogers, Daniel <drogers@shb.com>; 'David Sales' <david@salesappeals.com>; Fox, Gary <gfox@stfblaw.com>; 'Jack Day' <jackday@jud6.org>; 'Jeffrey Cohen' <jacohen@cfjblaw.com>; 'Laura Whitmore' <lwhitmore@shb.com>; 'Rebecca Mercier-Vargas' <RVargas@kwcvpa.com>; Slater, Thomas <tom@pajcic.com>
**Subject:** RE: SJI Civil - Products Liability -- state of the art

Here is the state of the art "defense" moved to 403.7. Should we have some type of note on use that cites to the statute

**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].**

**[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]].**

**From:** Alan Wagner [mailto:alanwagner@wagnerlaw.com]
**Sent:** Tuesday, February 07, 2017 2:48 PM
**To:** Telfer, Heather <HTelfer@floridabar.org>; 'Brian Baggot' <bbaggot@rumberger.com>; Rogers, Daniel <drogers@shb.com>; 'David Sales' <david@salesappeals.com>; Fox, Gary <gfox@stfblaw.com>; 'Jack Day' <jackday@jud6.org>; 'Jeffrey Cohen' <jacohen@cfjblaw.com>; 'Laura Whitmore' <lwhitmore@shb.com>; 'Rebecca Mercier-Vargas' <RVargas@kwcvpa.com>; Slater, Thomas <tom@pajcic.com>
**Subject:** RE: SJI Civil - Products Liability -- Comment k and unavoidably unsafe products

~~*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.

**From:** Alan Wagner [mailto:alanwagner@wagnerlaw.com]
**Sent:** Tuesday, February 07, 2017 2:50 PM
**To:** Telfer, Heather <HTelfer@floridabar.org>; 'Brian Baggot' <bbaggot@rumberger.com>; Rogers, Daniel <drogers@shb.com>; 'David Sales' <david@salesappeals.com>; Fox, Gary <gfox@stfblaw.com>; 'Jack Day' <jackday@jud6.org>; 'Jeffrey Cohen' <jacohen@cfjblaw.com>; 'Laura Whitmore' <lwhitmore@shb.com>; 'Rebecca Mercier-Vargas' <RVargas@kwcvpa.com>; Slater, Thomas <tom@pajcic.com>
**Subject:** RE: SJI Civil - Products Liability -- Model Instruction

Here is a red-lined version of the model instructions with some minor stylistic changes. The other changes all appeared to relate to additional issues that we decided not to add to the model

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler being driven on the highway by Dilbert Driver struck his car. The hay baler suddenly swerved across the road into the path of Smith, who was driving in the opposite direction. At the time, Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. 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.

Alan

Alan F. Wagner
Wagner McLaughlin, P.A.
601 Bayshore Blvd.
Suite 910
Tampa, Florida 33606
813-225-4000
www.WagnerLaw.com

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 atsjicivil@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~~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).

*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 thata 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.~~ 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.**

***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. 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.**

**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, fault, or responsibility of all parties to this action was caused by each of them.**

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

**[501.2a] Any bodily injury sustained by John Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.**

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

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

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

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

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

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

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

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

**[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

**The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate John Smith for these losses as they are actually experienced in future years.**

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

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

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

**[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.**

**[601.2b] Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.**

**[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against Dilbert Driver. The second is the negligence claims against Mishap Manufacturing Company and Sharp Sales Company. The third is the product defect claims against Mishap Manufacturing Company and Sharp Sales Company. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your**

**deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.**

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

***Following Closing Arguments, the final instructions are given:***

**[700] Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. Before you do so, I have a few last instructions for you.**

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

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

**If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.**

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

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

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

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

**Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.**

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

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

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

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

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

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

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

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

**You may now retire to decide your verdict.**

*Special Verdict Form*
VERDICT

**We, the jury, return the following verdict:**
**1. Was there negligence on the part of defendant Dilbert Driver which was a legal cause of damage to plaintiff, John Smith?**

**YES NO**

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

~~**YES NO**~~

**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~~<u> and 2</u> are ~~all~~<u>both</u> NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer~~~~ed YES to any of~~ <u>to either</u>Question~~s~~ 1~~-3~~<u> or 2 is YES</u>, ~~please~~ answer question 4<u>3</u>.**

**~~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).

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PRATHER • KEEN & LITTKY-RUBIN
TRIAL & APPELLATE ATTORNEYS

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

September 28, 2016

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

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

Dear Ms. Mercier Vargas:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*3. The Substantial Change Doctrine should be clarified.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**MODEL INSTRUCTION NO. 7**
**Modified in Bold and Red**

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

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler **being driven on the highway** by Dilbert Driver struck **his car**. The hay baler suddenly swerved across the road into the path of Smith, who was driving in the opposite direction. At the time, Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision.

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

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

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

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

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

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

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

The court's instruction:

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

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

[403.2] The claims and defenses in this case are as follows. John Smith claims that Dilbert Driver was negligent in the operation, **maintenance and inspection** of the hay baler **and the bolt** which caused him harm.

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

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

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

**Finally, John Smith also claims that the hay baler and the bolt designed and manufactured by Mishap and sold by Sharp was defective in design, had been defectively manufactured, had insufficient and defective warnings and instruction, and that the defects in the hay baler and the bolt caused him harm.**

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

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

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

[401.4 and 403.9] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. In the case of a designer, manufacturer, seller, importer, distributor, or supplier of a product, it is the care that a reasonably careful designer, manufacturer, seller, importer, distributor, or supplier would use under like circumstances. Negligence is doing something that a reasonably careful designer, manufacturer, seller, importer, distributor, or supplier would not do under like circumstances or failing to do something that a reasonably careful person, designer, manufacturer, seller, importer, distributor, or supplier would do under like circumstances.

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

[403.7b] A product is defective because of a design defect**, a manufacturing defect, or a warnings and instructions defect** if it is in a condition unreasonably dangerous to the user or a person in the vicinity of the product and the product is expected to and does reach the user without substantial change affecting that condition.

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

**A product is defective because of its manufacture if it is different from its intended design and the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer.**

**A product is defective because of its warnings or instructions if the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable warnings or instructions and the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer.**

[401.12a and 403.12a] Negligence or a defect in a product is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence or defect, the loss, injury, or damage would not have occurred.

[401.12b and 403.12b] In order to be regarded as a legal cause of loss, injury, or damage, negligence or a defect in a product need not be the only cause. Negligence or a defect in a product may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if the negligence or defect contributes substantially to producing such loss, injury, or damage.

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

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

The issues you must decide on John Smith's claim of negligence on the part of Sharp Sales Company, the seller of the hay baler **and the bolt,** are whether Sharp Sales Company was negligent in **providing warnings and instructions regarding** the hay baler **or the bolt,** or in its inspection of the hay baler **or the bolt** before selling it to John Smith, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to John Smith.

[403.15e] The issues you must decide on John Smith's claims of defect in the hay baler **and the bolt** against Mishap Manufacturing Company, the manufacturer of the hay baler **and the bolt,** and Sharp Sales Company, the seller of the hay baler **and the bolt,** are whether the hay baler **and the bolt** failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer and the hay baler, **and the bolt** reached Dilbert Driver without substantial change affecting the condition and, if so, whether that failure was a legal cause of the loss, injury, or damage to John Smith.

[403.17] If the greater weight of the evidence does not support one or more of John Smith's claims, then your verdict should be for Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company.
[403.18a] If, however, the greater weight of the evidence supports one or more of John Smith's claims against one or more of the defendants, then you shall consider the defenses raised by those defendants.

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

[403.18d] In deciding whether the hay baler **and the bolt were** defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of the hay baler's manufacture, not at the time of the loss, injury or damage.

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

If, however, the greater weight of the evidence shows that both John Smith and one or more of the defendants were negligent or responsible and that the negligence or responsibility of each contributed as a legal cause of loss, injury, or damage sustained by John Smith, you should decide and write on the verdict form what percentage of the total negligence, fault, or responsibility of all parties to this action was caused by each of them.

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

[501.2a] Any bodily injury sustained by John Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

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

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

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

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

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

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

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

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

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate John Smith for these losses as they are actually experienced in future years.

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

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

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

[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2b] Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against Dilbert Driver. The second is the negligence claims against Mishap Manufacturing Company and Sharp Sales Company. The third is the product defect claims against Mishap Manufacturing Company and Sharp Sales Company. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

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

Following Closing Arguments, the final instructions are given:

[700] Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. Before you do so, I have a few last instructions for you.

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

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

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

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

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

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

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

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

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

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

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

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

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

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

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

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

You may now retire to decide your verdict.

Special Verdict Form

**VERDICT**

We, the jury, return the following verdict:

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

**YES** _____ **NO** _____

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

**YES** _____ **NO** _____

2b. Did defendants Mishap Manufacturing Co. and Sharp Sales Co. place the hay baler **or the bolt** on the market with a defect which was a legal cause of damage to plaintiff, John Smith?

**YES** _____ **NO** _____

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

**YES** _____ **NO**_____

If your answers to questions 1**, 2a, 2b, and 3** are all NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If you answered YES to any of Questions 1**, 2a, 2b, or 3**, please answer question 4.

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

**YES** _____ **NO** _____

Please answer question 5.

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

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

Defendant Mishap Manufacturing Co. and Sharp Sales Co. (fill in only if you answered YES to question 2a and/or question 2b) _____%

Defendant Sharp Sales Co. (fill in only if you answered YES to Question 2b and/or question 3) _____%

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

_____%

Total must be 100%

Please answer question 6.

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

Total damages of plaintiff, John Smith $_____

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

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

_____
FOREPERSON
NOTES ON USE

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

Respectfully submitted,

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

JHL-R:smr

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