

>> PLEASE RISE.

HEAR YE HEAR YE HEAR YE THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION, ALL WITH A CAUSE TO
PLEA, DRAW NEAR, GIVE ATTENTION,
AND YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA, AND
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING, AND WELCOME TO
THE FLORIDA SUPREME COURT.

AND, ORAL ARGUMENT SECTION.

THE FIRST CASE ON OUR CALENDAR
IS STANDARD JURY INSTRUCTIONS IN
CIVIL CASES.

THE PARTIES READY TO PROCEED?

AND, YOU ALREADY HAVE DECIDED
HOW YOU WILL DIVIDE UP YOUR
TIME, CORRECT?

WHO WILL PROCEED FIRST?

AND YOU'LL DO FIVE MINUTES AND
FIVE MINUTES OF REBUTTAL.

>> YES.

>> ALL RIGHT.

>> MAY IT PLEASE THIS COURT.

GOOD MORNING, I AM TRACY GUNN
AND HAVE THIS PLEASURE OF
SERVING AS THE COURT CHAIR OF
THE SUPREME COURT COMMITTEE OF
STANDARD JURY INSTRUCTIONS IN
CIVIL CASES AND WOULD LIKE TO
TAKE A FEW MINUTES TO PRESENT
THE BACKGROUND AND HOW IT
DIFFERS FROM THE COMMITTEE'S
USUAL SUBMISSIONS TO THE COURT.

I HAVE WORKED WITH THE COMMITTEE
FOR A NUMBER OF YEARS, FIRST, AS
THE REPORTER, WHOSE JOB WAS TO
TAKE THE MINUTES OF THE

COMMITTEE AND IN THAT CAPACITY I REVIEWED THE MINUTES OF THE COMMITTEE FOR MANY YEARS BEFORE. SO I'M VERY FAMILIAR WITH THE WORK OF THE COMMITTEE OVER A HISTORICAL PERIOD.

AND, I WOULD SAY THERE ARE TWO PRIMARY WAYS IN WHICH THESE PROPOSALS DIFFER FROM THOSE THAT USUALLY COME TO THE COURT. THE FIRST IS THE VAST MAJORITY OF THE COMMITTEE'S PROPOSALS USUALLY COME TO THE COURT AS A UNANIMOUS OR VIRTUALLY UNANIMOUS CONSENSUS POSITION OF THE COMMITTEE.

THERE USUALLY IS NOT A MAJORITY VIEW AND MINORITY VIEW AND NOT EVEN A VOTE TAKEN, THERE IS USUALLY A DISCUSSION UNTIL THE CONSENSUS IS REACHED.

AND, SECONDLY IN MOST CASES THE COMMITTEE WILL NOT PROPOSE A NEW INSTRUCTION OR A CHANGE TO THE INSTRUCTION UNLESS THERE IS THAT CONSENSUS, AND WILL ERR ON THE SIDE OF REMAINING SILENT AND WAITING FOR THE LAW TO DEVELOP AND HERE BOTH ISSUES ARE DIFFERENT THAN USUAL.

WE HAVE FOR THE PAST SEVERAL YEARS THREE DIFFERENT SUBCOMMITTEES WORKING ON THE ENTIRE JURY INSTRUCTION BOOK. AT THE SAME TIME.

THE BOOK REORGANIZATION SUBCOMMITTEE, HAS AND EMOTIONS SUBCOMMITTEE AND THE PLAIN ENGLISH SUBCOMMITTEE.

THE SUBCOMMITTEE SUBMITTED AND THE COURT APPROVED A WHOLESAL REORGANIZATION OF THE ENTIRE

REST OF THE BOOK BUT WHEN IT CAME TO THE PRODUCTS LIABILITY INSTRUCTION BOTH THREE GENERAL COMMITTEES AND THE PRODUCTS LIABILITY SUBCOMMITTEE IDENTIFIED A NUMBER OF ISSUES THAT WARRANTED FURTHER DISCUSSION ON THE SUBSTANTIVE ISSUES.

AND, FOR SOME OF THESE THE COMMITTEE WAS NOT ABLE TO REFORM A CONSENSUS, AND AFTER YEARS OF DEBATE, LITERALLY YEARS... THE NEW DISCUSSION OF PRODUCTS LIABILITY BEGAN IN 2001.

THE MAJORITY OF THE MEMBERSHIP OF THE COMMITTEE CALLED FOR A VOTE AND THERE WAS A QUORUM OF THE COMMITTEE AND ATTENDANCE AT THE MEETING AND THE COMMITTEE WAS BOUND BY THE VOTE AND THAT IS AGAIN NOT OUR USUAL PROCEDURE BUT THE COMMITTEE AGREED A CONSENSUS WOULD NOT BE POSSIBLE AND WE HAD THE VOTE AND WE MOVED FORWARD WITH WORKING ON THE REST OF THE INSTRUCTIONS.

WE TOOK VOTES ON A NUMBER OF ISSUES AS WE WENT ALONG AND, SEVERAL OF THE VOTES WERE NOT UNANIMOUS.

BUT, ALL MEMBERS OF THE COMMITTEE WERE TOGETHER, AND ONCE THE DECISION HAD BEEN MADE, THE REST OF THE COMMITTEE WORKS ON THE NEXT ISSUE GOING FORWARD. THIS IS AN EXTREMELY DILIGENT AND HARD WORKING COMMITTEE, WITH A MEMBERSHIP FULL OF EXPERIENCED LAWYERS AND JUDGES AND THERE WAS SPIRITED DEBATE AND INTENSE DISAGREEMENT WITH THE COMMITTEE

ON SOME OF THE ISSUES.

BUT --

>> IS THAT BECAUSE THE LAW
WASN'T SEEN TO BE SETTLED ON
CERTAIN ISSUES.

>> YES.

>> AS OPPOSED TO PEOPLE
POSTURING?

>> I BELIEVE THAT THE PEOPLE WHO
DISAGREED WITH THE ISSUES
BELIEVED IN GOOD FAITH THAT THE
LAW WAS UNSETTLED, YES, YOUR
HONOR, AND A MAJORITY OF THE
COMMITTEE AGREED THAT THE LAW
WAS UNSETTLED, ABSOLUTELY.

>> AND WA -- WERE THERE CONCERNS
IN SOME OF THESE AND WE'VE
HIGHLIGHTED CERTAIN ONES.

>> YES.

>> THAT WILL BE DISCUSSED, THERE
MIGHT BE POTENTIALLY A DEVIATION
FROM WHAT THE LAW IS?

>> YES, YOUR HONOR, THERE IS A
CONCERN ABOUT THAT.

THE PROPOSALS AS SUBMITTED WERE
APPROVED BY A MAJORITY OF THE
COMMITTEE.

THAT DOES NOT MEAN THEY WERE
UNANIMOUS AND THE COURT ISSUES
THE -- ISSUES THAT YOU HAVE
IDENTIFIED ARE PRECISELY THE
ISSUES ABOUT WHICH THERE WAS
DEBATE ON THOSE QUESTIONS.

>> WE AT LEAST READ WHAT YOU
SEND TO US.

>> SEE, IT IS THIS BIG, YOU READ
WHAT WE SEND TO YOU AND
VIRTUALLY EVERYONE ON THE
COMMITTEE IDENTIFIED SOME ISSUES
WHERE THEY WERE AT LEAST
CONCERNED -- THERE WERE
CONCERNS, IF NOT CONVINCED THE

INSTRUCTIONS EITHER DID NOT ACCURATELY REFLECT THE LAW, OR, AT A MINIMUM MADE A STATEMENT AS TO WHAT THE LAW WAS, WHEN THE LAW IN FACT WAS UNCLEAR AND WE HAD A LITTLE BIT OF A CHECK EN AND EGG PROBLEM, BECAUSE THE INSTRUCTIONS WERE AROUND FOR 20, 30 YEARS, AND, WHEN WE WENT BACK TO LOOK AT THEM, WHEN THE THREE COMMITTEES WERE GOING, YOU KNOW, FINE TOOTHED COMB THROUGH THE WHOLE BOOK AND REVIEWING CITATIONS AND THE HISTORY OF THESE AND THE MINUTES...

>> LET ME SAY, I BELIEVE THE COURT REALLY UNDERSTANDS WHAT A GREAT JOB THAT YOUR COMMITTEE AND THE MEMBERS OF YOUR COMMITTEE HAVE DONE, AND THIS IS IN NO MEANS INTENDED AS CRITICISM OF THE COMMITTEE OR THE INDIVIDUALS, BUT, WE -- AS WE SAW THESE THINGS, I THINK THE MEMBERS OF THE COURT WERE CONCERNED THAT WE NEEDED TO REALLY FLESH THESE OUT A LITTLE BIT FURTHER AND BY NO MEANS, I MEAN, I THINK ALL OF US, TO A PERSON, THANK EVERY MEMBER OF THE COMMITTEE FOR ALL OF THE HARD WORK AND WE KNOW, BECAUSE THEY HAVE BEEN KEPT APPRISED AS YOU LET THE COURT KNOW.

BUT AS WE START THROUGH THESE, LETS TAKE AN OVERVIEW, THERE ARE A LOT OF COMMENTS, IS IT NOT POSSIBLE TO -- FOR THIS COURT TO MAKE SOME SUGGESTIONS BASED ON THOSE COMMENTS, AND ASK THE COMMITTEE TO CONSIDER DOING X, Y OR Z.

>> WE'D GREATLY APPRECIATE THAT.

>> WE CAN CLARIFY SOME OF THE THINGS WE SHOULD DO.

>> AND, IN FACT YOU WILL SEE THAT THE COMMITTEE FRANKLY RECEIVED THE POINT WHERE WE WERE UNABLE TO REACH A CONSENSUS AND EVERYONE AGREED THAT WE NEEDED FURTHER GUIDANCE FROM THE COURT...

>> IT APPEARS FROM LOOKING AT THIS, EVEN IF YOU, JUSTICE PARIENTE I THINK WAS CONCERNED BECAUSE WE SEE AT TIMES, THAT SOMETIMES COMMITTEES BECOME PHILOSOPHICALLY INVESTED RATHER THAN INVESTED IN THE SYSTEM.

>> YES, YOUR HONOR.

>> AND AS WE LOOK THROUGH THIS, IT APPEARS TO ME, THAT THERE IS A FAIR CROSS-SECTION OF ALL DIFFERENT IDEOLOGIES IF YOU WANT TO CALL IT THAT THAT HAVE COMMENTED.

DO YOU THINK THAT IS TRUE.

>> YES, YOUR HONOR --

>> AND A LOT OF CONSISTENCY, FOR EXAMPLE ON THE MERGING OF THE STRICT LIABILITY AND SOME OF THOSE THINGS TOGETHER AND APPEARS BOTH SIDES ARE IN AGREEMENT THAT MAYBE THEY SHOULDN'T BE TOGETHER.

AND, ALTHOUGH THE COMMITTEE MAY HAVE COME TO THAT CONCLUSION, IT APPEARS ON THE DESIGN DEFECTS AND PROPOSAL NUMBER NINE, IN MERGING THESE THINGS TOGETHER, THAT BOTH OF THOSE WHO DO DEFENSE WORK ON THAT ISSUE AND THOSE WHO PRESENT THE CLAIMS ARE SORT OF THE VIEW THEY SHOULDN'T

BE MERGED.

COULD WE NOT, IF THE COURT THINKS THAT THAT IS A CORRECT ANALYSIS, SUGGEST THEY BE SEPARATED AND, THE COMMITTEE CAN

--

>> ABSOLUTELY, YOUR HONOR AND THE EXISTING INSTRUCTIONS SEPARATE THEM, A MAJORITY OF THE MEMBERSHIP OF THE COMMITTEE VOTED TO COMBINE THEM.

THAT WAS A -- AN ISSUE OF GREAT DEBATE WITHIN THE COMMITTEE AND THERE WAS A STRONG MINORITY VIEW OPPOSING IT.

AND...

>> ARE YOU GOING TO SPEAK TO THAT?

THAT THIS IS FIRST ONE THAT RAISES... IN FACT THAT IS THE GUTS OF STRICT LIABILITY, GETTING IT RIGHT IS CRITICAL.

>> ON BEHALF OF THE COMMITTEE -- I DON'T UNDERSTAND WHAT THE BENEFIT IS, TO MERGING THEM WHEN YOU MIGHT HAVE MANUFACTURING AND DESIGN DEFECTS IN ONE CASE OR NOT.

WHAT WAS -- IS MR. STEWART GOING TO SPEAK TO THAT.

>> IF I CAN LET THE COMMENTATORS ADDRESS THOSE ISSUES, I WANTED TO GIVE THE COURT THE BACKGROUND AND LET THE COURT KNOW WHERE WE WERE AND IN TERMS OF GETTING -- WE WORKED TO COMPRISE THE COMMITTEE WITH THE BALANCE BETWEEN BOTH SIDES AND THE COURT GIVING US AN ADDITIONAL OPPORTUNITY FOR COMMENTS.

WE HAVE BROKEN THAT UP.

>> THE COMMITTEE ITSELF IS NOT

RECOMMENDING ANY CHANGES TO THEIR PROPOSALS, BASED ON THE COMMENTS.

>> THE COMMITTEE HAS MADE ITS PROPOSAL, BASED ON THE MAJORITY VOTE OF THE COMMITTEE.

WE CERTAINLY ASK FOR THE INSTRUCTION OF THE COURT AND WELCOME THE INSTRUCTION OF THE COURT ON REMAND.

>> THE COMMITTEE HAS NOT HAD AN OPPORTUNITY TO KID THE COMMENTS FILED THIS YEAR BECAUSE THERE WAS NOT TIME BETWEEN WHEN THE COMMENTS WERE FILED AND WHEN YOU WERE ASKED TO RESPOND TO THEM.

>> YOUR HONOR, I -- THAT IS CORRECT.

BUT, I BELIEVE THAT ON THE ISSUES THE COURT HAS IDENTIFIED, AND IT IS -- IN ITS NOTICE THEY WERE ALL MATTERS THE COMMITTEE PREVIOUSLY DECIDED AND THERE WERE A FEW ISSUES, INCLUDING THE NEW THIRD DCA CASE THE COMMITTEE COULD CONSIDER AND THE OTHER IS THE CHANGE OF THE COMPOSITION OF THE COMMITTEE AND MANY MEMBERS ROTATED OFF DUE TO TERM LIMITS AND UNFORTUNATELY, MANY OF THOSE MEMBERS WERE OUR MOST ACTIVE MEMBERS ON THESE ISSUES AND WE HAVE AN ENTIRELY NEW COMMITTEE, IT IS -- AND A THIRD OF THE COMMITTEE IS NEW NOW, SO... I'LL SAVE THE REST OF MY TIME FOR THE END IF THE COURT HAS FURTHER QUESTION AND MR. STEWART WILL SPEAK TO THE MERITS OF THE ISSUE.

>> THANK YOU.

MR. STEWART, ARE YOU NEXT?

OKAY.

>> I AM, YOUR HONOR.

MY NAME OF COURSE IS LARRY STEWART.

AND, I AM HERE FOR WHAT HAS BEEN DESCRIBED AS THE PLAINTIFFS' INTEREST, THOUGH THIS IS NOT AS YOU'RE WELL AWARE THE NORMAL CASE WHERE THERE IS A WINNER AND LOSER BELOW AND WE ARE ARGUING UP HERE AS ADVOCATES FOR WHAT THE LAW SHOULD BE.

THIS COMMITTEE PROCESS DEPENDS UPON, FOR ITS INTEGRITY, INTELLECTUALLY HONEST APPRAISAL OF WHAT THE LAW IS, AND NOT ADVOCACY, AT THE COMMITTEE LEVEL.

OUR COMMITTEE MEETINGS ARE NOT SUPPOSED TO BE CHARGE CONFERENCES.

>> LET'S...

>> CUT --

>> WE NEED TO GET TO 403 --

>> 403.7.

>> WHAT IS THE... IT MERGES TO... [INAUDIBLE] IS THAT SOMETHING -- FLORIDA JUSTICE ASSOCIATION SAYS ONE THING AND YOU TRY A LOT OF PRODUCTS LIABILITY CASES, IS THIS A BETTER INSTRUCTION THAN WHAT HAS EXISTED IN THE PAST, AND DOES IT CONFORM TO THE LAW.

>> IT CONFORMS TO THE LAW IN ONE RESPECT AND ANOTHER RESPECT WE BELIEVE IT DOES NOT.

>> AND THE BENEFIT IS...

>> RISK BENEFIT, WE BELIEVE, IS -- DOES NOT CONFORM TO THE LAW.

>> WE'VE NEVER ADOPTED THE RISK-BENEFIT APPROACH.

THE COURT HAS NOT.

>> IT HAS BEEN DISCUSSED IN
DICTA IN SOME DECISIONS BUT
THERE HAS NEVER BEEN A HOLDING,
ADOPTING RISK-BENEFIT AND AS A
MATTER OF FACT, THIS COURT
ADOPTED WEST, WHICH ADOPTED
402-A WHICH HAS NO RISK-BENEFIT
IN IT WHAT SO --

>> WITH THE MERGER, IS THAT IF
YOU HAVE RISK-BENEFIT, THAT AT
MOST PERTAINS TO A DESIGN DEFECT
CASE AND DOESN'T PERTAIN TO A
MANUFACTURING DEFECT CASE.

>> IT WOULD NOT PERTAIN TO A
MANUFACTURING CASE.

THAT IS CORRECT.

BUT WE THINK IT SHOULD NOT BE
PART OF 403-7 AT ALL.

BECAUSE, RISK-BENEFIT REALLY IS
A NEGLIGENCE TEST.

>> SO, IF YOU TAKE THAT OUT, AND
YOU SEPARATE THE INSTRUCTIONS
BACK, WHAT IS DIFFERENT FROM
WHAT EXISTED, I MEAN, WHAT IS
WRONG WITH WHAT EXISTED?

>> THE ONLY THING THAT WAS WRONG
WITH WHAT EXISTED WAS THAT IT
INCLUDED RISK-BENEFIT.

BECAUSE WHEN WE GOT INTO IT --

>> I'M SAYING WITH WHAT EXISTED,
IN THE CURRENT INSTRUCTIONS?

>> IN PL-5.

RISK-BENEFIT IS IN PL-5.

BECAUSE, WHAT HAPPENED, BACK
WHEN THIS COURT DECIDED HILL IN
1981 THERE WAS A FOOTNOTE IN
HILL.

IN HILL, FORD MADE THE ARGUMENT
IN THE HILL CASE THAT THERE
OUGHT TO BE ONLY A NEGLIGENCE
STANDARD FOR DESIGN DEFECT

CASES.

THAT IS THE SECOND HALF OF THE HILL CASE.

THIS COURT REJECTED IT AND SERVED STRICT LIABILITY APPLIES TO BOTH MANUFACTURING AND DESIGN DEFECTS.

THAT WAS THE HOLDING IN HILL.

BUT, IN A FOOTNOTE IN HILL, IN 1981, THIS COURT SAID COMMITTEE WE WANT YOU TO WORK MORE ON THE INSTRUCTION.

AT THAT POINT, THERE WAS NO RISK-BENEFIT IN THE INSTRUCTION WHATSOEVER.

PL-5.

THE COMMITTEE WENT BACK AND SPENT AN ENTIRE YEAR WORKING ON IT.

AND, THEY CHANGED THE INSTRUCTION BY DEFINING WHAT WAS THE TERM UNREASONABLY DANGEROUS.

BUT, THEN THEY GOT FORD'S BRIEF, IN THE HILL CASE, WHICH WAS ARGUING FOR RISK-BENEFIT TESTS FOR DESIGN DEFECTS.

AND, USING THAT BRIEF, THEY ADDED RISK BENEFIT INTO PL-5.

>> AND WHEN WAS THAT ADOPTED.

>> IN 1983.

>> SO, NOW, I GUESS, I SEE HOW, SO, REALLY, CAN YOU TELL...

403.7, OTHER THAN MERGING THE TWO, IS IT DIFFERENT FROM PL 4 AND 5.

>> IT IS NOT.

IT IS THE SAME AS PL 4 AND 5, EXCEPT THAT IT PUTS THE TWO TOGETHER.

>> BUT IF WE SEPARATE THEM BACK OUT, IT IS IDENTICAL TO WHAT...

>> IT WOULD BE ESSENTIALLY

IDENTICAL TO WHAT WE HAD.
>> AND IT SEEMS LIKE YOU HAVE --
SINCE WE HAVE HAD THIS IN, I
ASSUME, THAT THE COURTS HAVE
BEEN INSTRUCTING ON THE
RISK-BENEFIT, SINCE WE HAD... I
MEAN, IT ALREADY HAS BEEN IN THE
INSTRUCTIONS AND WHEN HAVE WE
REMOVED SOMETHING AFTER BEING IN
THE INSTRUCTION FOR 25 YEARS,
UNLESS WE CHANGE THE LAW ABOUT
IT.

>> ADOPTING AN INSTRUCTION IS
NOT A STATEMENT FROM THE COURT
ABOUT WHAT THE LAW IS.
YOUR OPINIONS ALWAYS SAY THAT
YOU ARE ONLY ARGUE PROVING IT
FOR PUBLICATION.

YOU ARE NOT APPROVING IT AS --
>> I GUESS WHAT I'M ASKING, IT
SEEMS IF WE WERE TO REMOVE IT
WE'D BE MAKING A STATEMENT THAT
SHOULD HAVE BEEN MADE AT THE
TIME WE ADOPTED IT, WHICH IS
THAT IS NOT WHAT THE LAW IS, NOW
THAT I SEE IT IS IN PL-5 I'M
LESS CONCERNED THAT IT IS IN
THERE.

>> WELL, THE PROBLEM WITH IT,
THERE ARE SEVERAL PROBLEMS WITH
IT BEING IN PL-5.

FIRST OF ALL.
THERE IS A QUESTION OF WHETHER
IT IS IN FACT THE LAW OF
FLORIDA, WHEN HE IS IT EVER HAS
BEEN ADOPTED.

AND I SUBMIT AND WE'VE ARGUED IN
OUR PAPERS THERE IS NO CASE IN
FLORIDA THAT HAS EVER ADOPTED
RISK-BENEFIT.

THAT IS NUMBER ONE, AND, NUMBER
2 IS, RISKS BENEFIT IS A

DIFFERENT THEORY, IT IS A
NEGLIGENCE THEORY AND YOU HAVE A
NEGLIGENCE THEORY PARKED IN THE
MIDDLE OF THE LIABILITY
INSTRUCTION AND THAT IS THE
SECOND THING THAT IS WRONG AND
THE THIRD THING IS WHEN THE
COMMITTEE ADOPTED THIS IN 1983
IT SAID IN THE NOTES, WE'RE NOT
SAYING WHETHER IT IS RIGHT OR
WRONG OR HOW THE TRIAL COURT
SHOULD DECIDE WHICH TO GIVE AND
EXPRESSION NO OPINION ON THAT
WHATSOEVER A AND SO WHETHER A
GIVE A CONSUMER PROTECTION TEST
OR A RISK BENEFIT TEST, WE END
UP WITH TRIAL COURTS GIVING BOTH
TESTS, TO THE JURY.

IN THE SAME CASE ON STRICT
LIABILITY.

SO, IN EFFECT WITHIN A STRICT
LIABILITY INSTRUCTION, THEY GIVE
THE STANDARD STRICT LIABILITY,
CONSUMER EXPECTATIONS TEST, AND,
A NEGLIGENCE TEST AT THE SAME
TIME.

>>... EXPECT FOR THIS POSITION,
WE ALWAYS SAY THAT WHEN WE ADOPT
INSTRUCTIONS WE'RE NOT
COMMENTING ON THE LAW.

IT SEEMS THAT YOUR ARGUMENT
WOULD BE BETTER RAISED IN A CASE
IN CONTROVERSY, AND THE COURT
DECIDES THAT, WHETHER, GIVING
BOTH ARE CONFUSING.

I HAVE A PROBLEM, NOW THAT THE
-- THAT I REAL LIE IT HAS BEEN
IN THERE, FOR SAYING WE OUGHT TO
MAKE A DECISION TO REMOVE IT.
SO, JUST BECAUSE -- I KNOW YOU
ONLY HAVE LIMITED TIME.

>> LET ME ASK ONE OTHER

QUESTION, A FOLLOW-UP TO THAT.
THE RISK-BENEFIT ANALYSIS, IS
THERE AN ISSUE WITH REGARD TO
WHETHER THAT APPLIES TO BOTH
MANUFACTURING DEFECTS AND DESIGN
DEFECT.

>> IT DOES NOT APPLY TO
MANUFACTURING --

>> IF YOU COMBINE THEM, SYSTEM
IT SHOULDN'T BE IN ONE, NO
MATTER WHAT, THE WAY IT WAS
BEFORE IT WAS IN THE DESIGN
DEFECT AREA.

>> THAT'S CORRECT.

>> SO THAT UNDERSTOOD, IF YOU
SEPARATE THEM IT WOULD ONLY GO
INTO THAT AREA AND REMAIN WHERE
IT WAS.

>> AND TO FOLLOW-UP, MAYBE WE
ASK THE COMMITTEE, HOW DID THAT
DEAL WITH THIS ISSUE THAT IT IS
ABSOLUTELY CONFUSING AND COULD
BE TO A TRIAL JUDGE IF THEY WERE
COMBINED THAT WAY?

I MEAN, WAS THAT DISCUSSION HAD?
NOBODY I THINK WOULD INTEND
AGAIN, A MANUFACTURING DEFECT,
TO USE A RISK BENEFIT ANALYSIS.
WAS SOMEONE TRYING TO ARGUE FOR
THAT?

>> NO, YOUR HONOR.

>> OKAY.

SO...

>> BUT, YOU KNOW, AT THE
COMMITTEE LEVEL, AND THIS IS IN
THE SUBMISSION TO THE COURT, THE
COMMITTEE, MAJORITY OF THE
COMMITTEE, CERTAINLY, THERE WAS
A DISSENTING VIEWPOINT OF SOME,
BUT, THE MAJORITY OF THE
COMMITTEE, WAS CONVINCED THAT IT
WAS NO LONGER SATISFIED THAT

THIS WAS A LAW IN FLORIDA.
AND I THINK THE COMMITTEE'S
OBLIGATION AT ANY POINT IN TIME,
THAT IT FINDS THAT THERE IS AN
INSTRUCTION, THAT DOES NOT
EXPRESS THE LAW IN FLORIDA,
WHETHER IT HAS BEEN THERE SIX
MONTHS OR TWO DAYS OR 20 YEARS,
IS OBLIGATED TO COME FORTH AND
SAY, THIS INSTRUCTION IS
INCORRECT.

>> BUT THE MAJORITY -- DIDN'T
THE COMMITTEE SUBMISSION
SEPTEMBER IT IN THERE.

>> WHAT THE COMMITTEE DID IS
THEY GOT TO THE POINT THAT THEY
DECIDED THAT IT WAS NO LONGER
SATISFIED THIS WAS THE LAW IN
FLORIDA AND THEN THEY PUNTED.
WE SAY THEY SHOULD HAVE GONE THE
NEXT STEP TO BE INTELLECTUALLY
HONEST AND TAKE IT OUT OF THE --
403.7.

IT IS A NEGLIGENCE STANDARD THAT
IS PART OF A NEGLIGENCE CASE,
NOT PART OF THE STRICT
LIABILITY.

>> STATEMENT TOWARDS -- UNDER
STRICT LIABILITY, ISN'T IT.

>> UNDER 402-A, IT IS NOT IN
THERE WHATSOEVER, IT IS IN THE
NEW RESTATEMENT THIRD, WHICH
CAME OUT A FEW YEARS AGO.
HIGHLY CONTROVERSIAL.

AND THE IN RESTATEMENT WOULD
ABOLISH 402-A AND WEST VERSUS
CATERPILLAR AND WOULD BE IN NAME
ONLY AND IS TOTALLY A NEGLIGENCE
STANDARD -- IN NAME ONLY AND
MOST SUPREME COURTS AROUND THE
U.S. HAVE REJECTED IT, BUT WE
SHOULDN'T BE ARGUING ABOUT THAT,

BECAUSE THAT HAS TO COME, I
SUBMIT IN A CASE IN CONTROVERSY
ON WHETHER YOU WILL ADOPT THIS
NEW RESTATEMENT, WHICH IS A
TOTALLY DIFFERENT ANIMAL AND A
VERY RADICAL ANIMAL.

>> WHY DON'T WE GO ON TO 403.9,
THE NEGLIGENCE...

>> CERTAINLY.

>> IT HAS BEEN ASKED, WHERE DOES
IT COME IN A PRODUCT BEING IN
AND UNREASONABLY DANGEROUS
CONDITION.

>> IT CAME UP FROM AN ARGUMENT
BASED UPON A DISTRICT COURT OF
APPEAL CASES, WHERE THERE WERE
INCONSISTENT VERDICTS OR WHERE
THE COURT DECIDED THAT THERE WAS
NO PROOF OF NEGLIGENCE AND IN
THOSE OPINIONS, THERE IS
LANGUAGE THAT SAYS IN THOSE
CASES, THERE HAD TO BE PROOF OF
BE A UNREASONABLY DANGEROUS
PRODUCT BECAUSE THE CLAIMS IN
THOSE CASES UNDER NEGLIGENCE AND
STRICT LIABILITY WERE EXACTLY ON
THE SAME FACTS.

AND, THIS WAS USED TO SUPPORT
THE ARGUMENT THAT THIS SHOULD BE
INSERTED IN THERE.

I THINK THE INSTRUCTION IS WRONG
BECAUSE THERE ARE CASES WHERE
YOU CAN HAVE A NEGLIGENCE CLAIM
UNDER ONE SET OF FACTS, STRICT
LIABILITY ON ANOTHER SET OF
FACTS, AND, IF YOU APPROVE THIS
INSTRUCTION, WHAT YOU ARE SAYING
IS IN EVERY, SINGLE CASE, YOU
CAN ONLY HAVE A NEGLIGENCE CLAIM
IF YOU PROVE THAT THE PRODUCT
WAS UNREASONABLY DANGEROUS WHICH
IS TANTAMOUNT TO PROVING STRICT

LIABILITY.

>> YOU WOULD JUST WANT TO US
TAKE OUT THE MOISTURE, THAT
SAYS...

>> EXACTLY.

>>... IT WOULD END WITH
CIRCUMSTANCES.

>> EXACTLY.

IT WOULD BE THE TRADITIONAL
NEGLIGENCE INSTRUCTION THAT THIS
COURT ALREADY APPROVED.

>> 403.11, THERE WAS COMPLIANCE
WITH GOVERNMENT RULES.

>> YES.

>> THAT IS NOT AN INSTRUCTION.
IS THAT CORRECT?

>> IT IS NOT AN INSTRUCTION FROM
THE COMMITTEE.

THE COMMITTEE DID NOT SUBMIT AN
INSTRUCTION ON THAT POINT.

WHAT HAPPENED WAS, THE PRODUCTS
LIABILITY SUBCOMMITTEE APPROVED
AN INSTRUCTION, THAT STATUTE

467.-- WHATEVER IT IS, CALLED

THE -- STATUTE IS CALLED THE

GOVERNMENT RULES DEFENSE BUT

WHAT IT IS, A MIRROR IMAGE AND

SAYS IF THERE IS EVIDENCE OF

VIOLATION OF A GOVERNMENT RULE

THERE IS A PRESUMPTION OF

LIABILITY AND IF THERE IS

EVIDENCE OF COMPLIANCE THERE IS

A PRESUMPTION OF NO LIABILITY.

SO...

>> FROM THE STATUTE.

>> FROM THE STATUTE.

WHAT THE STATUTE SAYS AND IS A
PRESUMPTION, NOT AND IN FENCE,
ACCORDING TO THE STATUTE.

THE SUBCOMMITTEE APPROVED

INSTRUCTIONS BASED ON THE -- IT.

WHEN IT GOT TO THE FULL

COMMITTEE, WE GOT... YOU'LL SEE IN THE MINUTES, WE GOT WRAPPED UP IN A BIG ARGUMENT ABOUT WHETHER YOU INSTRUCT ON INFERENCES AND BUBBLES AND VANISHING THINGS AND ALL OF THE REST OF THE STUFF, AND THE COMMITTEE DECIDED NOT TO SEND UP THE INSTRUCTION THAT HAD BEEN APPROVE BY THE SUBCOMMITTEE. FOR OUR SIDE WE SAY THERE OUGHT TO BE AN INSTRUCTION AND OUGHT TO BE WHAT THE SUBCOMMITTEE APPROVED...

>> SHOULDN'T IT HAVE -- IF IT WILL BE AN INSTRUCTION SHOULDN'T IT GO BOTH WAYS.

>> YES.

OH, YES.

AND IT DID GO BOTH WAYS, WHEN IT CAME OUT OF THE SUBCOMMITTEE IT WENT BOTH WAYS, THERE WAS THE VIOLATION SIDE, AND THERE WAS THE COMPLIANCE SIDE.

>> DID THE SUBCOMMITTEE ADDRESS WHETHER IT WAS A BURDEN SHIFTING PRESUMPTION OR VANISHING PRESUMPTION?

>> WE DISCUSSED THAT AND EVERYTHING THAT YOU CAN IMAGINE, UP ONE SIDE AND DOWN THE OTHER. I DON'T THINK WE CAME TO ANY CONCLUSION ABOUT WHAT -- I TAKE THAT BACK.

WE DID COME TO A CONCLUSION IT WAS NOT A VANISHING ANIMAL, BECAUSE YOU WOULDN'T GIVE AN INSTRUCTION ON IT IF IT WAS VANISHING.

SO, BY THE MERE FACT THAT WE SUBMITTED AN INSTRUCTION, WE HAD TO CONCLUDED THAT IT WAS NOT

VANISHING AND THERE'S -- THERE IS NOTHING IN THE STATUTE THAT WOULD INDICATE THAT IT IS VANISHING.

AND...

>> ON ITS FACE IT SEEMED TO BE A DECLARATION OF PUBLIC POLICY.

>> THAT WAS THE SUBCOMMITTEE'S VIEW OF IT.

AND, THEREFORE WELL, HAD TO INSTRUCT ON IT.

THAT PARTIES WERE ENTITLED, WHICHEVER WAY IT FELL, PARTIES WERE ENTITLED TO HAVE AN INSTRUCTION ON IT.

WHETHER IT WAS A VIOLATION OR COMPLIANCE.

SO, THAT IS THE POSITION AS FAR AS THAT IS CONCERNED.

>> WHAT HAS BEEN HAPPENING ON THE GROUND, SINCE THE STATUTE HAS BEEN ADOPTED, FOR HOW IT IS BEING APPLIED, ARE THERE ANY CASES FROM THE LOWER COURTS ON IT.

>> NOT THAT I'M AWARE OF AND NOT THAT WE HEARD OF IN OUR CONSIDERATION OF THIS, AT THE COMMITTEE LEVEL.

>> SO, I MEAN, IT HAS BEEN -- A LONG TIME SINCE I LOOKED PACK BUT ARE THERE INSTRUCTIONS IN THE -- WHEN THERE IS VIOLATION OF TRAFFIC RULES, THAT, WHAT DOES THAT SAY.

>> IT SAYS CONCEPTUALLY THE SAME THING THAT -- WHAT THE SUBCOMMITTEE CAME OUT WITH, WHAT WE ARE SUGGESTING THE COURT SHOULD APPROVE.

WHAT THE SUBCOMMITTEE...

>> I GUESS, I'M SURPRISED AND

TELL ME, THE PRESIDENT'S BAR WANTS AN INSTRUCTION THAT SAYS COMPLIANCE WITH GOVERNMENT IS A PRESUMPTION OF NO LIABILITY, WITH COMPLIANCE WITH GOVERNMENT REGULATIONS?

>> WE WANT THE INSTRUCTION THAT SAYS VIOLATION OF THE RULES...

[LAUGHTER].

>> WHAT'S GOOD FOR THE GOOSE IS GOOD FOR THE GANDER.

THAT'S THE WAY IT FALLS OUT.

I MEAN, YOU CAN'T HAVE ONE AND

--

>> INSTRUCTIONS WERE GIVEN THAT SAID VIOLATIONS THAT THERE WAS A PRESUMPTION OF --

>> THERE IS, IN THE 401 GENERAL NEGLIGENCE, WHICH YOU HAVE ALREADY APPROVED, WE HAVE THE STANDARD INSTRUCTION ON VIOLATION OF A STATUTE.

AND VIOLATION OF AN ORDINANCE, AND, THOSE DIDN'T CHANGE, THEY HAD BEEN IN THE INSTRUCTIONS FOR YEARS AND YEARS AND YEARS, AND ALL WE DID, AT THE SUBCOMMITTEE LEVEL, WAS TAKE THOSE INSTRUCTIONS AS A MODEL, AND CRAFT THE INSTRUCTION THAT...

>> YOU AGAIN ARE BEING CANDID ABOUT THIS AND YOU AGREE, IT WOULD GO BOTH WAYS.

>> ABSOLUTELY.

I MEAN, YOU CAN'T HAVE IT ONE WAY AND NOT THE OTHER.

SO...

>> THEN I GUESS CRASHWORTHINESS WAS THE OTHER SORT OF BIG ONE WE WERE CONCERNED ABOUT, SEEMED LIKE THERE WAS SOMETHING MISSING FROM THE INSTRUCTIONS THE WAY...

>> YOU ALL RAISED IT.

I DON'T THINK ANYBODY ON THE DEFENSE SIDE IS GOING TO COMMENT ON THAT TODAY.

BUT, WE MADE THE FLORIDA JUSTICE ASSOCIATION MADE A FEW SUGGESTIONS FOR SOME MINOR IMPROVEMENTS IN THAT INSTRUCTION I DON'T THINK THAT THEY ARE OR SHOULD BE VERY CONTROVERSIAL.

>> I GUESS WE WERE -- I KNOW MY CONCERN WAS, SHOULDN'T THERE BE CLARIFICATION... [INAUDIBLE] DEFECT CAUSED THE ORIGINAL ACCIDENT.

>> THAT IS ONE OF SUGGESTIONS THAT WE MADE TO PUT LANGUAGE IN THERE TO THAT EFFECT.

I CAN'T IMAGINE THAT THE DEFENSE WOULD OBJECT TO THAT.

WE ALSO SUGGESTED PUTTING A FOOTNOTE -- NOT A FOOTNOTE BUT A NOTE ON USE TO THE EFFECT, CLARIFY THAT THE FAULT OF THE OTHER PEOPLE ARE NOT AN ISSUE, IN THOSE CASES.

THAT WOULD GO IN AS A NOTE ON USE WHICH IS DIRECTLY OUT OF DAMARIO, AND...

>> I KNOW THE OTHER ONE, IT IS 403.18.

I DON'T KNOW, DID WE ASK YOU ABOUT THAT.

>> DEFENSE ISSUES.

YOU DID NOT ASK ME ABOUT THOSE.

>> THE AFFIRMATIVE DEFENSE OF THE RISK-BENEFIT IS ADDED AS AN AFFIRMATIVE DEFENSE.

>> CORRECT.

>>... WOULD BE USED.

>> WHY WOULD THAT BE USED.

>> WHY WOULD THAT BE USED?
>> WOULD THAT BE THAN A DEFENSE
TO NEGLIGENCE OR TOO STRICT
LIABILITY?

>> STRICT LIABILITY OR
NEGLIGENCE.

>> SOON TO A DEGREE THAT WOULD
AN APPROPRIATE PLACE TO TAKE IT
OUT OF THE BURDEN.

>> CORRECT.

IT CAN'T BE BOTH.

IF YOU GO BACK AND LOOK AT FOR
TWO A, COMMENTS K. IS
ESSENTIALLY A RISK-BENEFIT
DEFENSE UNDER 40 28.

THAT IS FOR AN UNAVOIDABLY
DANGEROUS PRODUCT WITH A
MANUFACTURER CANNOT MAKE IT
COMPLETELY SAFE AND GIVES PROPER
WARNING AND DIRECTIONS.

THIS COURT HAS WRITTEN AN
OPINION AND VISCERAL CASE NOTING
THAT THIS IS AN AFFIRMATIVE
DEFENSE AND WE SAY THAT THAT
SUPPORTS PUTTING IT AS AN
AFFIRMATIVE DEFENSE AND NOT
PARTIS FOR A 3.7.

>> BUT THE COMMITTEE PUT IT IN
BOTH PLACES.

>> A PRETTY GOOD IN BOTH PLACES
BECAUSE THEY WERE TRYING TO
COVER THE WATERHOLE.

PUTTING IN BOTH BOTH PLACES OF
NOTE SAYING IS ONE OF THE OTHER
TRIAL COURT, YOU DECIDE YOUR YOU
HAVE TO DECIDE, TRUAX COURT.
YOU CAN GIVE ENDEARING PART OF
THE PLAINTIFF'S BURDEN AND ALSO
GIVE IT OVER HERE AS A DEFENSE.

>> ARE THERE CASES THAT IS GONE
BOTH WAYS THAT YOU PUT IT AS A
PART OF THE -- NO?

ON THE CASELAW IS AN AFFIRMATIVE
DEFENSE?

>> WELL, THEY'RE GOING TO ARGUE
THYMIC PERMITTED DEFENSE THAT IT
SHOULD BE IN 403.7.

I THINK WE BOTH AGREE IT DOESN'T
GO BOTH PLACES.

IN EITHER THOSE ONE OR OTHER.
WE SAY THAT WHEN YOU READ 402 A,
THE BURDEN IS ON THE DEFENDANT
TO TO RAISE IT TO IMPROVE IT AS
AN INTERPRETIVE DEFENSE.
YAMAICHI TANK ASSEMBLIES FOR A
LAWYER FOR A LONG TIME AND IN
THE COURTROOM, I THINK THIS IS
THE RECIPE FOR DISASTER PENDING
FURTHER DEVELOPMENTS IN THE LAW
TO THE LONGITUDINAL POSITION ON
ONE OF THE RISK-BENEFIT IS THE
STANDARD FOR PRODUCT DEFECT
SHOULD BE INCLUDED IN 437 OR AN
AFFIRMATIVE DEFENSE UNDER 43.18.
AND THEN YOU SAY THEY SHOULDN'T
INSTRUCT ON BOTH.
>> THAT'S WHAT YOU GOT RIGHT NOW
UNDER PL FOUR NPO FIVE.
AN APPEAL FIBROCYSTIC AND HE
TAKES NO POSITION ON WHETHER THE
PROPER TEST IS TO EXPECTATIONS
ARE RISK-BENEFIT.
>> WHAT THEY DO IS TO SET THEY
JUST REPO.
BUT WE DON'T HAVE IT RIGHT NOW
IS THE LIMITED SENSE, SO TO
FURTHER CONFUSE THE TRIAL
JUDGES.
>> TO SHOOT TAKEN IT OUT AND
STRAIGHTEN IT OUT BEFORE 3.7.
THEN YOU'VE GOT TO CASE LAW TO
SUPPORT THAT.
THEN YOU DON'T HAVE CASE LAW TO
SUPPORT KEEPING IT IN FOR 3.7.
>> COMING TO CASE THAT A PROCESS
THAT SHOULD BE.
>> THE SEARLE CASE.
A RISK-BENEFIT IS AN AFFIRMATIVE
DEFENSE.
IF YOU LOOK AT 403 -- 402 A
ADOPTED WITH COMMENTS K. IT'S AN

AFFIRMATIVE DEFENSE, WHICH IS
QUARTER TOP DID IN LAST.
SO WESTERN SEARLE SEARLE IT'S AN
AFFIRMATIVE DEFENSE AND NOT PART
OF STRICT LIABILITY.
THERE'S ONE OTHER THING THAT
THEY SHOULD NOTE AS PART OF THE
DEFENSES UNDER 403.18 AND THAT

IS WHAT IS CURRENTLY IN THE INSTRUCTIONS AS I FORGET WHICH SUBPARAGRAPH IT IS, BUT IT'S CALLED STATE-OF-THE-ART DEFENSE. JULIE MAKES A GOOD LINE IN HIS COMMENTS.

THAT IS NOT AN AFFIRMATIVE DEFENSE.

IT IS AN INSTRUCTION ON HOW THE CHERRY IS TO DEAL WITH THE EVIDENCE.

THERE'S NO BURDEN OF PROOF INVOLVED IN IT OR ISSUE INVOLVED IN THE ARID AND JOEL IS CORRECT.

IT HAS BEEN MOVED UP IN THE DEFENSE CAN BE A STANDALONE INSTRUCTION AT AN EARLIER POINT.

>> SUBSECTION D. YOU SHALL CONSIDER THE CASE OF THE SCIENTIFIC AND TECHNICAL KNOWLEDGE IN OTHER CIRCUMSTANCES THAT EXISTED IN TIMES OF THE MANUFACTURER.

>> CORRECT.

IT'S NOT A DEFENSE, ALTHOUGH IF YOU LOOK AT THE STATUE, IT'S GOT THE TITLE OF THE STATUE.

>> I WAS PART OF THE PRODUCT VENDOR VIABILITY.

>> IT OUT TO BE MOVED UP IN THE INSTRUCTIONS.

I THINK WORD SHOULD GO WITH FOR 15 RIGHT NOW.

>> I WOULD BE SOMETHING I WOULD THINK THE DEFENSE LAWYERS WOULD OBJECT TO.

THAT SEEMS LIKE A LOGICAL.

>> IT SEEMS LOGICAL TO ME.

NO OTHER DEFENSE INTERESTS HAVE COMMENTS ON THE TOTAL.

JOEL PRODDER UP IN HIS COMMENTS AND I THINK HE IS CORRECT

..

I'M

>> HOW ABOUT THE INSTRUCTIONS
THAT WOULD EMERGE MODELS SEVEN
AND EIGHT INTO JUST ONE NUMBER
SEVEN?

>> THE COMMITTEE IS NOT THE JUST
THE TWO TOGETHER.

THE COMMITTEE DECIDED CURRENT MODEL NUMBER SEVEN NOT TO BE UP IN IT BECAUSE IT'S JUST OUTDATED AND NOT USED ANYMORE.

IT'S AN EXPRESS WARRANTY INSTRUCTION AND THERE ARE VERY, VERY -- NOT THE COMMITTEE SAYING YOU SHOULD GET RID OF SEVEN AND EIGHT?

>> KNOW, GET RID OF SEVEN HAVE AN UNLIMITED NUMBER EIGHT WHICH IS A HAPEVILLE OR CASE AND WE JUST PLUGGED IN THE NEW INSTRUCTIONS AND NUMBER EIGHT. WE REALLY DIDN'T CHANGE ANYTHING OTHER THAN PUT THE NEW INSTRUCTIONS IN THERE.

SO WE'RE NOT MERGING, BUT WE'RE JUST GETTING RID OF WHAT REALLY IS AN OBSOLETE AT THE TRIAL JUDGES SAID THEY NEVER SEE THESE CASES ANYMORE AND RATHER THAN GO TO THE EFFORT OF REVAMPING THE ANGRY MODIFYING IT TO FIT THE NEW INSTRUCTIONS, WE JUST DELETE TODAY.

>> I HAVE A NOTE AND YOU MAY KNOW WHAT THIS REFERS TO, WHETHER IT ALTERS THE NOTES ABOUT WHETHER THE BYSTANDER MUST BE FORESEEABLE.

ISN'T THAT A CHANGE IN --

>> THAT IS NOT A CHANGE.

IN YOUR CURRENT INSTRUCTIONS, IF YOU LOOK AT PL FIVE AND PROBABLY PL FOUR, TWO, THERE IS A PHRASE AND MANNER THAT COVERS BYSTANDERS AND IS COVERED IN THE NOTES.

THAT WAS TAKEN VERBATIM AND MOVED OVER TO THE NEW INSTRUCTIONS, NO CHANGE WITH THE

WEATHER.

IN THE NOTE ON USE, WE EXPANDED
THE NOTE ON USE TO BE A LITTLE
MORE DESCRIPTIVE OF THE
BYSTANDER ISSUE AND WHAT THE
COURTS HAVE SAID IN THE OPINIONS
ABOUT IT.

BUT THERE IS NO CHANGE AS FAR AS

BYSTANDER.

IN THE WEST, THIS COURT DECIDED THAT THE CLAIM WAS FOR BOTH INTERPARTY THAT WAS DIRECTLY USING THAT THING AND ANY BYSTANDER THAT WAS INJURED AS A RESULT OF IT.

SO BYSTANDERS HAVE ALWAYS BEEN PROPER CLAIMANTS IN STRICT PRODUCTS LAID THAT IT CLAIMS AND THERE'S BEEN NO CHANGE IN THE SUBSTANCE OF THE INSTRUCTION IN THAT REGARD.

THAT'S THE EXACT SAME LANGUAGE.

>> WELCOME WAS CERTAINLY THANK YOU MR. STEWART FOR YOUR PRESENTATION HERE TODAY.

>> THANK YOU ARE A MATCH.

DONATE SEVEN SECONDS OVER.

>> GOOD MORNING.

MAY PLEASE THE COURT, WENDY LUMISH FROM CARLTON FIELDS.

THANK YOU FOR THE OPPORTUNITY TO APPEAR TODAY.

I'M A SURVEY SAYING THERE'S SOME AGREEMENT.

WE AGREE ON THE SIDE OF THE ART INSTRUCTION THE QUESTION THAT WAS JUST ASK ACCRETION NOT BE ON THE DEFENSE SIDE SO MAYBE WE'RE MAKING SOME PROGRESS.

>> I ACTUALLY THINK THAT'S A HELPFUL THING FOR THE DEFENSE.

I THINK THE CONFESSION IS SHOWING THE SUMMIT INTEREST AND JUST TRYING TO GET THE LAW INSTRUCTIONS THE WEBLOG IS.

>> EXACTLY ANYTHING THE WHOLE PROCESS DEMONSTRATES WHY IN THE TRIAL IN THE TRENCHES WAS AN HOURS UPON HOURS WORKING ON CHARGES IN PRODUCT LIABILITY

CASES AND HAVING TRIAL JUDGES TO
HIGH DON'T UNDERSTAND, WHY IS
THIS SO DIFFICULT?

I THINK THAT NINE YEARS AT LEAST
THAT I LABOR ON THE COMMITTEE
WITH OTHERS DEMONSTRATES THAT
THESE REALLY ARE TOUGH ISSUES SO
WE REALLY APPRECIATE THE

OPPORTUNITY TO BE ABLE TO COME BEFORE THE COURTS AND TRY TO CLEAR SOME OF THE SUB.

THE ISSUES THAT I'M GOING TO ADDRESS TODAY REALLY PRIMARILY TO PROPOSAL IT.

THE QUESTION OF THE PROPER TEST OF THE DESIGN CASE CAN BE INTERMINGLED IN A MANUFACTURING AND DESIGN, THE NOTE UNUSEFUL RELATING TO THE RESTATEMENT THIRD OF STEWART IN THE TWO ISSUE RULE AND I'LL REFER TO OTHERS TO ADDRESS THE NEGATIVE THINGS ISSUE IN MS. O'CONNOR WILL ADDRESS THE ISSUE ON THE PRESUMPTION.

AS FORMER MEMBERS --

>> LET ME ASK YOU THIS.

IS ANYONE GOING TO ADDRESS THE RISK-BENEFIT AND WHETHER OR NOT THAT IS REALLY, EXCUSE ME, AFFIRMATIVE DEFENSE?

>> THAT'S ME.

I WILL DO THAT.

CERTAINLY AS A PRELIMINARY MATTER, MR. CUOMO AND I UNDERSTAND OUR WORLD TODAY IS NOT TO ARGUE WITH THE LAW SHOULD BE.

I LOVE TO LOOK AT CASES AND INTERPRET THEM AND THAT'S WHAT I HOPE TO DO.

LET ME TURN FIRST HOPEFULLY TO A NOTE CAN CLEAR UP SOME ISSUES ON THE MANUFACTURING DEFECT ISSUE. IT JUST IS.

THE U.S. TO COUPLE QUESTIONS BUT TO ANSWER ON THAT.

FIRST OF ALL, THE DEFECT INSTRUCTION WAS CALLED PL FOUR AND THEN I'M INSTRUCTION IT SAID

SIMPLY, IT PRACTICES
UNREASONABLY DANGEROUS BECAUSE
OF MANUFACTURING DEFECT IF IT
DOES NOT CONFORM TO ITS INTENDED
DESIGN FAILS TO PERFORM AS
SAFELY AS THE INTENDED DESIGN
WOULD HAVE PERFORMED.
WE AGREE AND I THINK EVERYONE

AGREES THAT IN THE MANUFACTURING DEFECT CASE THE RISK UTILITY TEST DOES NOT APPLY.

AND THE FOUR WERE INSTRUCTION SAID THAT.

WE BELIEVE THAT IT IS IMPORTANT TO SEPARATE THE TWO INSTRUCTIONS FOR THE REASONS EXPRESSED TODAY. IT IS A CONFUSING.

THEY ARE TWO DIFFERENT THEORIES. THE CASES RECOGNIZE THAT THEY'RE DIFFERENT THEORIES OF LIABILITY. THEY'RE DIFFERENT ISSUES THAT RELATE TO THE TWO AND PUTTING THEM TOGETHER AND TELLING A TRIAL JUDGE IF YOU MANUFACTURING DEFECT CASE QUANTITIES AND PICKUP HAVE DESCENDED THEN PLUG IT IN THERE, THERE'S ABSOLUTELY NO BASIS TO DO THAT.

AND SO OUR POSITION IS THAT THE COURT SHOULD RETAIN THE PL FOR CONSTRUCTION OF THAT WAS. NOW COME YOU ALSO ASKED THE QUESTION ABOUT IS THERE A CHANGE IN THE NEW INSTRUCTIONS IF WE JUST PULL OUT WHAT THE COMMITTEE HAS RECOMMENDED AND MOVE IT OVER, IS IT DIFFERENT?

AND THE ANSWER TO THAT IS YES IT IS DIFFERENT AND WE THINK IT'S DIFFERENT IN A SIGNIFICANT WAY. THE DIFFERENCES AS I MENTIONED UNDER THE PRIOR VERSION THE QUESTION WAS THE JURY HAS TO DECIDE WHETHER CONFORM TO THE INTENDED DESIGN AND THEN WEATHERFIELD TO PERFORM AS SAFELY AS THE INTENDED DESIGN WOULD HAVE PERFORMED.

IN OTHER WORDS, IT WASN'T JUST ENOUGH THAT IT DIDN'T CONFORM.

MAYBE PUT THE NOW A LITTLE BIT
FURTHER OVER.

THAT WASN'T ENOUGH.

HE ALSO HAD TO SHOW THAT IT
FAILED TO PERFORM AS SAFELY AS
BEEN INTENDED DESIGN WOULD HAVE
PERFORMED.

THE NEW INSTRUCTION IS PROPOSED

IN THE KNOW TO USE WHEN INSTEAD
PUT AN END WOULD READ A PROJECT
IS UNREASONABLY DANGEROUS IF THE
PRODUCT WAS NOT BUILT ACCORDING
TO ITS INTENDED DESIGN.

OR BECAUSE IT FAILED TO PERFORM
AS SAFELY AS AN ORDINARY
CONSUMER.

SO UNDER THE NEW PROPOSED
INSTRUCTION.

>> ARE WE TALKING ABOUT 40317?

>> YOU HAVE TO GO TO THE NOTE
UNUSEFUL OR TO GET THE LANGUAGE
FOR MANUFACTURING DEFECT CASE
WHICH IS OUR PROBLEM.

IF YOU ARE TELLING PEOPLE YOU
HAVE TO GO TO A NOTE ON USED WEB
LANGUAGE, WHY NOT KEEP THEM
SEPARATE?

AND SO MY POINT IS, SEPARATE
THEM FOR ONE AND TO ANSWER YOUR
QUESTION IS, WAS AT THE SAME?
KNOW, THE PROPOSAL ON THE TABLE
WHEN YOU PULL UP A NOTE UNUSEFUL
AND NOW IS GOING TO GIVE YOU A
DIFFERENT INSTRUCTION THAN WHAT
WAS PREVIOUSLY PROVIDED.

>> LET ME MAKE SURE -- I MEAN, I
UNDERSTOOD THAT THE COMMENTATORS
WERE THE MAJORITY AGREE THE
SHOULD BE SEPARATE.

THERE'S AGREEMENT ON THAT POINT.

>> WELL, I THINK THAT ALL OF THE
COMMENTS QUOTE UNQUOTE DEFENSE
COMMENTS WHERE THEY SHOULD BE
SEPARATED YOUR TOOL EAT-IN WAS A
MEMBER OF THE COMMITTEE AT THE
TIME AND 2004, WE CHANGED THE
MANUFACTURING DEFECT
INSTRUCTION.

HE WAS ON THE COMMITTEE AT THAT
TIME AND AGREE TO THAT LANGUAGE.

I BELIEVE BF JA AND
MR. STEWART'S COMMENTS AS WELL
AS JUDGE FARMER'S SUGGESTED THEY
SHOULD BE ONE INSTRUCTION MERGE
TOGETHER.

>> I DIDN'T HEAR THAT THIS
MORNING.

I HEARD THAT THIS MORNING THEY

SHOULD NOT BE COMBINED.

AND MY --

>> AS I UNDERSTAND IT, BF JA,
MR. STEWART AND JUDGE FARMER
BELIEVES THEY SHOULD BE COMBINED
IN ONE INSTRUCTION.

MR. STEWART, MYSELF ARE ALL OF
THE COMMITTEE NOW.

>> I'M THINKING THE COMMENTS WE
RECEIVED, BF JA SAID IT WOULD
MAKE A CONFUSING.

AND I THOUGHT THAT'S WHAT HE
SAID.

>> I MAY HAVE MISUNDERSTOOD.

>> YOU'RE CLEARLY ON THE RECORD
AS SAYING THEY SHOULD BE
SEPARATE.

THEY SHOULD BE SET RATED AND
IT'S WRONG.

>> IF THEY'RE SEPARATED, SHOULD
THEY BE DIFFERENT THAN WHAT IS
NOW TL FOR AND FIVE?

>> IN MY OPINION PEEL FOUR WITH
A CORRECT STATEMENT OF THE LAW
AND HE CANNOT BE CHANGED HERE AT
A HOTEL YOU THAT THE POSITION OF
MANY ON THE OTHER SIDE IS THAT
IT DIDN'T ACCURATELY REFLECT THE
LANGUAGE ABOUT THE CONSUMER
EXPECT HAITIAN TESTS.

IF THAT FAILS TO PERFORM AS
SAFELY AS THE INTENDED DESIGN
AND THERE WERE THOSE BELIEVE
THEY SHOULD INSTEAD DAY AS
SAFELY AS THE ORDINARY CONSUMER.

I WOULD SUBMIT THAT IF YOU
CHANGE IT SO THAT THERE IS AND
AND AND THERE IS A REQUIREMENT
NOW THAT THE PRODUCT DOES NOT
BUILD ACCORDING TO DESIGN GO TO
PERFORM AS SAFELY AS YOUR
ORDINARY CONSUMER I THINK THAT'S

A CORRECT STATEMENT.
SO I WOULD HAVE NO PROBLEM WITH
THE CURRENT INSTRUCTION WERE
MODIFIED SLIGHTLY AS LONG AS THE
INDUSTRY BEEN THERE.
>> IT DOES NOT CONFORM WITH THE
INTENT DESIGN AND A SALES REFORM
AS SAFELY AS THE INTENDED DESIGN

WOULD CONFORM YOU WOULD AGREE THAT IT SHOULD BE SUBSTITUTED WITH THE CONSUMER EXPECTATIONS?

>> I THINK THE PL FOUR AS IT STANDS IS FINE, BUT I WOULD HAVE NO PROBLEM WITH CHANGING THE LANGUAGE AS THE SECOND PART OF THE CADETS AT THE CORE BELIEF CONFORMS.

BUT I THINK AS IT STOOD THAT WAS FINE.

>> THAT'S THE PROPOSAL AS A PRODUCT FAILS TO PERFORM AS SAFELY AS AN ORDINARY CONSUMER EFFECT WHEN USED AS INTENDED OR USED IN A MATTER REASONABLY INTENDED IT TO CREATOR.

>> NOTABLY THOUGH THE MAJORITY PUT AN OAR IN THERE AND WERE SAYING IT HAS TO BE AN AND.

OKAY, IT GETS A LITTLE COMPENSATED, BUT THE POINT --

>> WE SHOULD SEND A PURIST COMMENT HE COOMASSIE, D.

>> WE DID THAT WHEN BILL WAGNER WAS THE CHAIR THE SUBCOMMITTEE SHE IS TO GIVE US THE CHECK OUT AND WE STILL COULDN'T AGREE.

THE OTHER QUICK POINT TO MAKE ON THE MANUFACTURING DEFECT ISSUE IF THERE IS A NOTE ON USED ONE THAT TALKS ABOUT SEEKING IMPROVED.

WE THINK THAT THAT'S AN APPROPRIATE IN A JURY INSTRUCTION TO TALK ABOUT LEADING A PROOF REQUIREMENTS IN ADDITION TO THAT WE BELIEVE THAT'S AN INCORRECT STATEMENT. WE DETAILED THAT IN OUR SUBMISSION.

AND SO WILL LEAVE IT AT THAT FOR

THE MOMENT SOMEONE TO TALK ABOUT
THE DESIGN DEFECT RISK UTILITY
TEST I THINK THAT THE OTHER
ISSUE OF CONCERN TO THE COURT.
WE BELIEVE THAT THE NEW
INSTRUCTION IS CORRECT.
IT INCLUDES BOTH TESTS.
IT REFLECTS TL FIVE AS IT WAS

BEFORE.

SO WE HAVE NO PROBLEM WITH THE INSTRUCTION.

OUR PROBLEM IS WITH THE NOTE ON USED IN TWO RESPECTS.

THE NOTE ON YOU SUGGEST THE RISK UTILITY TEST IS NOT A TEST OF A DEFECT IN THAT IT'S AN AFFIRMATIVE DEFENSE.

LET ME START WITH THE AFFIRMATIVE DEFENSE.

MR. STEWART SAID IT WAS A SUPREME COURT CASE.

IT WAS A SECOND DCA CASE.

IT FELT VERY SPECIFIC WAY WITH COMMENT K., WHICH IS UNAVOIDABLY UNSAFE PRODUCTS, A VERY NARROW CATEGORY OF AUDIT, NOT THE NORM.

SO THE SUGGESTION THAT I.T.

SUPPORTS THE NOTION THAT ANY PRODUCT LIABILITY CASE THE RISK UTILITY CASE IS AN AFFIRMATIVE DEFENSE I SUBMIT THAT THE INCORRECT AND NOT SUPPORTED BY FLORIDA LAW.

NO CASE HOLD THAT IT'S AN AFFIRMATIVE DEFENSE.

THE REST OF THE STORY RELATING TO THE RISK UTILITY TEST IS A TEST OF DEFECT, OUR PROPOSAL WHAT I WOULD SUBMIT IS APPROPRIATE IS TO RETAIN THE CURRENT COMMENT WHICH BASICALLY SAYS HERE'S BOTH A PENDING FURTHER DEVELOPMENT WE CAN'T TELL YOU WHICH ONE TO USE AND WHEN TO USE IT.

>> WELL, LET'S GO BACK.

I THINK THERE YOU COULD HAVE DIFFERENT INSTRUCTIONS AND EVERY DISTRICT, EVERY CIRCUIT THAT'S DIFFERENT.

IS THERE A CASE THAT IS THAT
THERE IS SOME FORM OF
RISK-BENEFIT PROOF THAT IS
REQUIRED BEFORE AS A CONDITION
PRECEDENT TO A DESIGN DEFECT
VERDICT?

>> I BELIEVE THERE ARE MULTIPLE
CASES IN FLORIDA TO SUPPORT THE

USE OF RISK-BENEFIT TEST.

>> I DIDN'T SAY THAT.

THE ANSWER IS I ASK IT.

I UNDERSTAND THERE'S A LOT OF CASES THAT TALK ABOUT A LOT OF DIFFERENT THINGS.

IS THERE A CASE THAT SAYS THERE'S A PROOF OF WOMEN WITH REGARD TO THE RISK-BENEFIT CONCEPT AS PART OF YOUR BURDEN OF PROOF IN PREVAILING ON A DESIGN DEFECT CASE?

>> I THINK FRAMED IN THOSE EXACT WORDS, NO.

>> THAT THE PROBLEM WOULD GET INTO BECAUSE YOU'RE SAYING IT'S NOT THE AFFIRMATIVE DEFENSE. THEY'RE SAYING IT'S NOT PART OF AN ELEMENT IS CLEAN.

IT SEEMS TO ME IS PROBABLY NEITHER ONE.

IF THERE'S NOT A CASE THAT HOLDS AS ONE OR THE OTHER, THEN IT SOMETHING ELSE.

IT'S NOT BEEN INSTRUCTED ON PART OF A CLAIM OR DEFENSIVE BURDEN.

>> WELL, WHAT I WOULD SAY IS THERE TO CASES FROM THE FORDYCE IN COURT.

THE AUBURN CASE WHICH THERE'S BEEN NO DISCUSSION ON IRRADIATION TECHNOLOGY.

IN BOTH CASES THE ISSUE WAS NOT DIRECTLY WHAT THE TEXT OF DESIGN DEFECT IN FLORIDA WHICH IS WHY IS IT THE QUESTION KNOW WHEN YOU ASK THAT.

HOWEVER, BOTH CASES LOOK AT THE QUESTION OF WHAT DOES UNREASONABLY DANGEROUS AND AS AN ELEMENT OF STRICT LIABILITY 402

A.

BECAUSE REMEMBER 402 A SELLS A
PRODUCT IS DEFECTIVE AND
UNREASONABLY DANGEROUS.
IT DOESN'T BEEN DEFINED WHAT
UNREASONABLY DANGEROUS IT.
AND THE AUBURN CASE THEY WERE
DECIDING WHETHER OR NOT TO ADOPT
THE PATTERN DANGER EXCEPTION AS

THE DEFENSE AND THE COURTS DO NOT AGREE WITH THE QUESTION IS WHETHER OR NOT THE PRODUCT IS UNREASONABLY DANGEROUS. WE'RE GOING TO USE THE RISK UTILITY TEST AND NOT HOW YOU EXPLAIN WHY A KNIFE IS NOT DEFECT DID EVEN THOUGH IT COULDN'T HAVE BECAUSE IT DOESN'T HAVE AN UNREASONABLE DANGER. FOLLOWING THAT, THIS COURT IN RADIATION TECHNOLOGY WAS ASKED TO LOOK AT WHETHER OR NOT A PRODUCT WAS INHERENTLY DANGEROUS IF IT DID NOT CAUSE INJURY TO A PERSON.

WHAT THE COURT HELD IN MY CASE WAS INHERENTLY DANGEROUS IS REALLY A QUOTE UNQUOTE PASSÉ CONCEPT IN THE CONTEXT OF NOW STRICT LIABILITY UNDER 402 A AND THEY SAID BALANCING TEST TO FIND UNREASONABLY DANGEROUS. AND IN THAT CASE THEY FOLLOWED THE AUBURN CASE.

SINCE THAT TIME, MULTIPLE DISTRICT WORTH OF LOOKED AT THIS ISSUE IN SOME CONTEXT AND HAVE TOO RECOGNIZED THE RISK UTILITY TEST.

LIKE VERSUS MULDER WITH A SUMMARY THEY LOOKED AND SAID THERE IS A FACT ISSUE ON CONSUMER EXPECT PATIENT.

>> WHAT'S HAPPENING BASICALLY SAID HE SPENT A LOT OF TIME AT THE JURY INSTRUCTION.

OUR JUDGES INSTRUCT THEM USING BOTH THE CONSUMER EXPECTATION AND THE RISK-BENEFIT?

>> IN MANY CASES, THEIR USE OF BOTH.

AS THE COURT CENSURE OVER THE
RISK UTILITY TEST AND IT WAS
REVERSED AND IN MY CASE THE
COURT COURT HELD THAT POST HAS
SHOULD HAVE BEEN INSTRUCTED.
AGAIN SUGGESTED THE RISK UTILITY
TEST DOES ONE TEST.
TO BE CLEAR, I'M NOT SUGGESTING

THE LAW'S CLEAR THIS AREA.
IF YOU WERE WE WOULDN'T BE
DEBATING IT FOR NINE YEARS OR
MORE.

THE POINT DO WE MAKE IS THE
CURRENT COMMENT SAYS THAT THERE
ARE TWO TESTS AND HERE ARE SOME
CASES THAT ADDRESS THE.

THIS WHOLE DEBATE STARTED INTO
COMMITTEE AFTER THE FOURTH CASE
BECAUSE I RECOMMENDED UP A POINT
THAT WE NEED TO ADD THAT IT'S
ANOTHER CASE ADDRESSING THE
ISSUE.

AND I THINK THAT THE BEST
SERVICE WE CAN DO TO THE BENCH
BAR NOW IS TO JUST PUT A STRING
SITE TO ALL OF THE CASES AND LET
THE LITIGANTS FIGHT IT OUT IN
THE CONTEXT OF A PARTICULAR
CASE.

OR IS THOUGH BLACK BUTTERFLY IN
TERMS OF THIS TESTIFIES IN THIS
CASE, THIS APPLIES IN THAT CASE.
MAYBE THERE WILL BE WHEN THE
APPROPRIATE CASE COMES BEFORE
THE COURT.

UNTIL THAT TIME FOR THE COMMENTS
TO SUGGEST BUT IT'S ONE OR THE
OTHER, THE LAW DOES NOT
SUPPORTED WE THINK WILL CAUSE
CONFUSION WITH ABSOLUTE AND
NECESSARY IN A CIRCUMSTANCE
WHERE LITIGANTS HAVE BEEN GOING
THROUGH --

>> TAKE EITHER PART OF THE CLAIM
WITH YOU FOR IT IS.

>> I THINK IT'S CLEAR THE ONLY
CIRCUMSTANCE THAT MIGHT BE
CONSIDERED IN THE DEPARTMENT
DEFENSE UNDER ADAMS IS A COMMENT
CASE WHICH IS A SPECIFIC CASE

INVOLVING AN UNAVOIDABLY UNSAFE
PRODUCTS.

THE NORMAL CIRCUMSTANCE.

>> IN A DESIGN CASE.

SO AT LEAST FOR AN AGREEMENT
THEY ARE.

IT DOESN'T APPLY IN THE
MANUFACTURING CONTEXT.

SO WERE MAKING SOME PROGRESS.

>> I'M SORRY AND WE DO AGREE ON THAT.

IF THERE IS AN EXCEPTION AND ALL IN THE RISK UTILITY TEST AS A DEFENSE AND I DON'T CONCEIVE IT'S EVER HAD TO WOULD BE IN THE CONTEXT OF COMMENT K. IN THE AFFIRMATIVE DEFENSE OF ME TO SAY THAT.

BUT THAT DOESN'T CHANGE THE ISSUE OF WHETHER THE RISK UTILITY TEST IS ONE OF THE TEST THAT HAS BEEN CITED IN CASES IN FLORIDA.

AND WE BELIEVE THAT THE CURRENT COMMENT WHICH SAYS THAT PENDING FURTHER DEVELOPMENT HERE ARE SOME CASES, WE BELIEVE THAT'S APPROPRIATE.

RIGHT NOW IT SAYS THESE CONCEPTS ARE DISCUSSED IN AND RIGHT NOW IT'S RADIATION IS CC ANONYMOUS. WE THINK THE ONLY THING WE SHOULD DO IS ADD THE OTHER NAME CASES DO IT AND ADDRESS IT.

I KNOW I'VE OVERPECK MAKE ONE MORE QUICK POINT THERE'S A NOTE ON NEW SPORT RELATING TO THE RESTATEMENT THIRD.

OUR ONLY POINT, DISTANCE THE TIME THE COMMITTEE ADDRESSED THE ISSUE, ANOTHER CASES, THE THIRD DISTRICT THAT ACTUALLY DOES RECOGNIZE THE RESTATEMENT.

WE THINK IT NEEDS TO BE REFLECTIVE OF THE NEWER DECISION.

I'M NOT SUGGESTING THE RISK UTILITY HAS BEEN ADOPTED BUT HE NEEDS TO CORRECTLY REFLECT TO CASES HEAR THE COMMENTS OPPOSING

IT SAYS ITS OUTLIER.

IT IS NOT FOR THIS COMMITTEE TO
DECIDE WHICH CASES AN OUTLIER IN
WHICH CASE IT'S NOT.

>> THANK YOU VERY MUCH FOR YOUR
PRESENTATION.

MR. CALDWELL.

>> MAY PLEASE THE COURT.

MY NAME IS RICHARD CALDWELL.
I WILL ADDRESS THE NEGLIGENCE
ISSUES AND PROPOSALS 10 AND 11.
THE PRIMARY PROBLEM THAT'S
PRESENTED ABOUT A PROPOSED
INSTRUCTION 403.9, THE
NEGLIGENCE INSTRUCTION AS IT
FAILS TO MENTION THE JURY MUST
FIND THAT THE PRODUCT IN
QUESTION IS DEFECT GAVE.
AND THE SAME CLAUSE IS PRESENT
IN THE INSTRUCTION 403.10 OF THE
FAILURE TO WARN AND IN THE NOTE
ON USE ONE.
NOW SUPPORT FOR MY PROPOSITION
I REALLY CAN'T DO ANY BETTER
THAN TO QUOTE THE WORDS OF THIS
COURT FROM WEST VERSUS
CATERPILLAR.
WHICH SAID AT THE HEART OF EACH.
THAT IS NEGLIGENCE OR STRICT
LIABILITY IS THE REQUIREMENT
THAT THE PLAINTIFFS INJURY MUST
HAVE BEEN CAUSED BY SOME DEFECT
IN THE PRODUCT AND INTERESTINGLY
DEFECT IS CAPITALIZED IN THE
OPINION.
GENERALLY WHEN THE INJURY IS
NOWHERE TRIVIAL TO THE DEFECT IS
NO BASIS FOR IMPOSING PRODUCT
LIABILITY UPON THE MANUFACTURE
AND THEY CITE THE ROYAL VERSUS
BLACK & DECKER MANUFACTURING
CASE WHICH WAS ALSO CITED IN OUR
COMMENT.
I STUDIOUSLY AVOIDING THE WORD
DEFECT IN THE PROPOSED
INSTRUCTIONS, 403.9 M. 403.10
DAY STATE LAW BY ATTEMPTING TO
DIVORCE TO MAKE WHAT SHOULD
CONCEPT UNDER DISCUSSION HERE
FROM THE VERY ESSENCE, THE VERY

BASIS OF PRODUCT LIABILITY LAW,
WHICH IS THAT THERE MUST BE A
DEFECT.

AND THE SAME PROBLEM WITH THE
DAILY SPILLS OVER INTO 43.15,
THE ISSUES.

>> IF WE VIEW IT FROM THAT
PERSPECTIVE, YOU'RE BASICALLY

ARGUING ALL NEGLIGENCE AND STRICT LIABILITY CONCEPTS SHOULD BE PRESENTED TOGETHER.

>> NO, SIR.

THEY ARE DIFFERENT.

>> I WAS UNDER THE INFLUENCE THIS WAS A STRICT LIABILITY CASE.

>> OF COURSE THEY DECIDED TO DO THAT.

BUT IN SO DOING THE COURT USED THE LANGUAGE THAT I JUST QUOTED IS PART OF THE RATIONALE FOR THE ADOPTION OF STRICT LIABILITY.

>> WHAT IS THE INSTRUCTION SET AND NEGLIGENCE WITH REGARD TO PRODUCT BETWEEN WEST AND EAST PROPOSALS?

>> THERE WAS NO NEGLIGENCE INSTRUCTION PRODUCTS.

>> WHAT WAS THE PRACTICAL --

>> THE PRACTICAL MATTER WAS WE BASICALLY ATTACKED 3.5 AND WE WOULD SEE NEGLIGENCE IS THE FAILURE TO REACH THE CARE IN SUCH WERE THE ISSUE WOULD BE WHETHER THE MANUFACTURER WAS NEGLIGENT IN MANUFACTURER PRODUCING AND SELLING WHATEVER IT IS A TRUCK PRODUCT FRAME WINDOW GROUP WITH A DEFECT IN THE STEERING SYSTEM, BRAKING SYSTEM, WHATEVER, WHICH CAUSED INJURY.

SO THAT THE WAY IT WAS HANDLED.

>> SO THIS IS WHERE I THINK YOUR POINT IS THE CASE IF THE PLAINTIFF DECIDED THEY WANT TO BRING THIS FAILURE TO WARN AND NEGLIGENCE CLAIM TO THIS POST OF STRICT LIABILITY ON TILL YOUR WARRANTED.

IT SEEMS TO ME SOMEBODY COULD BE
NEGLIGENT AND HAVING WARNED IN
THE LEGAL CAUSE OF INJURY
OBVIOUSLY THEY HAVE TO PROVE
THAT WITHOUT HAVING TO SAY AND
THAT FAILURE TO WARN RESPA
PRODUCT IN A DANGEROUS POSITION.
IT SEEMS THAT HAVING THIS

ELEMENT IS REQUIRED FOR THE STRICT LIABILITY TO BE UNREASONABLY DANGEROUS AND BRING IT OVER TO THE NEGLIGENT SIDE. WHY WAS IT THAT THE ONE THAT NECESSARY?

IN OTHER WORDS, THE FAILURE TO WARN OR FAILURE TO NEGLIGENTLY WARNED.

>> IF I FOLLOW THE COURTS QUESTION, THAT WAS SORT OF THE PROBLEM PRESENTED IN THE MORELAND VERSUS SAFETY ENGINEERING CASE IN WHICH THE JURY THERE FELT NO DEFECT THAT NEGLIGENCE IN THE DEFENDANT THERE ARGUED LESS THAN INCONSISTENT VERDICTS IN THE FOURTH DISTRICT COURT OF APPEAL POINTED OUT KNOW THAT THERE WAS EVIDENCE OF BOTH DEFECTS IN WARNING ABOUT THE JURY COULD VERY WELL HAVE FOUND A DEFECT IN THE PROJECT AT LEAST WAS PRESENT WHEN IT LEFT THE HANDS OF THE MANUFACTURER BUT THAT THERE WAS A NEGLIGENT FAILURE TO ONE OF THE DEFECT WHICH OCCURRED LATER. SO THE COURT IS CORRECT.

NUMBER ONE, THERE IS A DIFFERENCE BETWEEN STRICT LIABILITY AND NEGLIGENCE. HOWEVER, IF YOU'RE TALKING ABOUT DESIGN OR MANUFACTURING DEFECT, THE NEGLIGENCE AND THOSE ISSUES HAS TO RESOLVE AROUND THE DEFECT.

>> IS VERY NOTE ON USE THAT SAYS THAT, YOU KNOW, IN OTHER WORDS, I JUST GOT THE INSTRUCTION IS FINE, BUT IT SEEMS THAT BY PUTTING IN THE RESULTS OF A

PRODUCT BEING IN UNREASONABLY
DANGEROUS CONDITION IS MERGING
THESE TWO SERIES TO A WAY THAT I
THINK COULD BE CONFUSING TO A
JURY.

>> WE DO NOT HAVE A PROBLEM.
IN FACT, WE OBJECT TO IT.
MS. LUMISH AND I OBJECT IT AND

NOT PROPOSED INSTRUCTION.

IT'S A POOR SUBSTITUTE FOR THE WORD DEFECT.

UNREASONABLY DANGEROUS IS A STRICT LIABILITY CONCEPTS.

>> WEST VERSUS CALA COLOR ON THE FIRST DISTRICT COURT OF APPEAL, FIRST LINK IN VERSUS DAVIS 2007 CASE.

THE WORD DEFECT, CONCEPT OF DEFECT IS INHERENTLY EMBEDDED IN A NEGLIGENCE PRODUCT LIABILITY CLAIM.

THE PRODUCT HAS GOT TO BE AFFECTED.

IT'S GOING TO THE WARNING ASPECT.

SO ARE YOU SAYING THEN THAT THE LACK OF THE WARNING PRODUCES A DEFECTIVE PRODUCT.

THAT'S THE ARGUMENT.

SO THAT WORD HAS TO COME IN.

AND ALL SITUATIONS --

>> I THINK WERE IN AGREEMENT WITH THE PART OF THE JUSTICE ASSOCIATION THAT THE WORDS AND TO COME OUT.

>> IS THAT ALWAYS?

>> WE HAVE PROPOSED SOME LANGUAGE TO PUT IN PLACE OF THAT IS THAT THE JURY MUST FIND --

>> IS NOT A TRUE STATEMENT TO SAY THAT ANYTIME YOU DEAL WITH THE FAILURE TO WARRENT NEGLIGENCE IN THAT ARENA THAT IT MUST BE A DEFECTIVE PROJECT OR THE PRODUCT MAY BE FINE IS JUST THAT YOU HAVEN'T WORN PROPERLY AS TO WHATEVER.

>> .SLOT 3.10.

>> IF THE NEGLIGENT DESIGN DEFECT.

>> WHAT YOU HAVE THE ONE THAT
ONE MAKES THE PRODUCT
UNREASONABLY DANGEROUS, SO IT
ALSO HAS THE SAME LANGUAGE.

>> AGAIN, IF YOU USE THE
DEFECT --

>> I ASKED THAT QUESTION TO
WARNING.

DOES UNDER OUR LAW AND I DON'T HAVE THE ANSWER TO THIS, BUT IT TO ME THAT YOU COULD HAVE A FAILURE TO WARN, BUT THAT DOESN'T MAKE PRODUCT DEFECT IS. THE SHOES THAT FIGURED NO ONE NOT WARNED WHATEVER IT IS GOOD THE PRODUCT MAY BE OPERATING EXACTLY THE WAY IT WAS DESIGNED AND INTENDED.

BUT BECAUSE OF THAT, THERE NEEDS TO BE SOME KIND OF WARNING TO IT THAT THE SAFETY DEVICES.

BUT IT'S NOT A PERFECT PRODUCT, THE FAILURE TO WARN OF THIS.

[INAUDIBLE]

>> YOU WOULDN'T HAVE DEFECT THERE.

>> BECAUSE THE DEFECT IS IN THE WARNING.

>> EFFECTIVELY AND A LOT OF TIMES THEY DO WANT TO GIVE WARNING OF THE DEFECT AND THEY HAVE THE RIGHT TO TRY TO SHOW THAT THE STRICT LIABILITY.

WHEN YOU'RE JUST DOING PLAIN OLD NEGLIGENCE TO TRY TO HAVE TO DESCRIBE IT AS A DEFECT IN WHICH BRINGS YOU RIGHT BACK TO THE STRICT LIABILITY INSTRUCTION SEEMS THAT IT ENDS UP HAVING THE RISK OF A JURY MERGING THE TWO CONCEPTS.

AND IT SEEMS LIKE IT'S WORKING PRETTY WELL WHEN YOU HAVEN'T HAD AN INSTRUCTION ON NEGLIGENT.

>> RIGHT, THE CONCEPT OF DEFECT CREATES A STRICT LIABILITY.

THE CONCEPT FOR DEFECTS, THE ROYAL VERSUS BLACK & DECKER CASE WAS DECIDED BY THE THIRD DISTRICT COURT OF APPEAL IN

1967, NINE YEARS BEFORE THE
ADOPTION OF THE STRICT LIABILITY
BY THIS COURT.
SO THE CONCEPT OF DEFECT IS AS I
SAID THE CORNERSTONE OF PRODUCTS
LIABILITY IN FLORIDA.
I MEAN, THE CASES ARE UNANIMOUS
THAT YOU HAVE TO HAVE THE

CONCEPT DEFECT IN A PRODUCTS LIABILITY CASE IN AN INSTRUCTION AND NEGLIGENCE INSTRUCTION, WHICH TOTALLY OMITTS THE WORD DEFECT, DOES NOT CONFORM TO THE LAW OF FLORIDA.

>> AND WHAT THAT MR. CALDWELL COMING TO HAVE USED UP ALL OF YOUR TIME.

MS. O'CONNOR.

>> MAY IT PLEASE THE COURT, I'M KATHLEEN O'CONNOR AND I'M HERE TODAY TO ADDRESS THE GOVERNMENT RULES JURY INSTRUCTION.

I'M HERE BECAUSE THE GOVERNMENT RULES AND INSTRUCTIONS HAVE BEEN PULLED BY THE COMMITTEE AND EVERYBODY WHO HAS SUBMITTED COMMENTS ON THIS, WHETHER FOR THE PLAINTIFF SIDE OR THE DEFENSE SIDE AGREES THAT THERE SHOULD EAT AN INSTRUCTION ON THIS.

AND I THINK JUSTICE.

ANTIQUE, I'D LIKE TO MAKE A COUPLE OF COMMENTS ABOUT SOME QUESTIONS THAT SHE LAST MR. STEWART WHAT'S HAPPENING ON THE GROUND AND ARE THERE ANY CASES.

WHAT'S HAPPENING ON THE GROUND AS I DO A LOT OF TRAIL SUPPORT WORK AS WELL AS THOSE APPEALS AND I WOULD SAY IT'S OUR EXPERIENCE THAT MOST JUDGES ARE NOT GIVING AN INSTRUCTION ON THE GOVERNMENT RULES AND BECAUSE THERE ISN'T A STANDARD INSTRUCTION.

IN THE WARTIME THAT GOES BY WITHOUT ONE, THE MORE THE JUDGES THINK WELL IF I'M SUPPOSED TO

GIVE AN INSTRUCTION ON THIS, THE
UNIT STRUCTURE THAN THE BOAT.
THIS STATUTE HAS BEEN ON THE
BOOKS FOR 11 YEARS.
WE WERE SUCCESSFUL.
I WOULD SAY MAYBE IN TWO OUT OF
FIVE CASES JUDGES HAVE GIVEN
THIS INSTRUCTION AND WE DO HAVE

A CASE SITE OR THE 11th
CIRCUIT GROUP TO GIVING OF THE
GOVERNMENT RULES INSTRUCTION IN
THE CASE AND WE CITED THAT THEIR
PAPERS.

IT BECAME READERS CASE.

SO EVERYONE OUTSIDE AGREES THERE
SHOULD EVEN INSTRUCTION.

>> EVERYONE BUT THE COMMITTEE
THAT SUBMITTED THE REPORT.

>> YES A LOT THE ONLY REASON I'M
HERE.

IF EVERYONE AGREED IT WOULD'VE
STAYED HOME, BUT THE COMMITTEE
DOES NOT AGREE.

SO WE THINK.

>> WHAT IS THE PROBLEM THAT WAS
EXPRESSED AS WHETHER THIS IS A
REBUTTABLE PRESUMPTION RE:
VANISHING PRESUMPTION.

IS THAT WHAT CAUSED THE HANGUP?

>> I THINK THAT WAS ONE THING
THAT CAUSED A HANGUP FROM MY
READING THROUGH THE COMMITTEE
NOTES.

BUT I THINK IN THIS CASE IT IS
IF WE HAVE TO PUT A LABEL ON IT,
IT IS A BURDEN SHIFTING
PRESUMPTION WHEN YOU'RE TALKING
ABOUT THE MANUFACTURER FAILING
TO COMPLY WITH THE STANDARDS.

IF THAT'S THE SITUATION, THEN
THE MANUFACTURER IS A
PRESUMPTION APPLIES IN THE
MANUFACTURER HAS TO OVERCOME
THAT PRESUMPTION.

>> WHY WOULDN'T IT GO THE OTHER
WAY?

>> WELL, BECAUSE THE BURDEN IS
ALREADY ON THE PLAINTIFF TO
PROVE DEFECT.

SO IF THE MANUFACTURER COMPLIES,

THE PRESUMPTION APPLIES AND THE
PRODUCT IS PRESUMED NOT TO BE
DEFECT DID, BUT THE PLAINTIFF
CAN OVERCOME THAT BECAUSE IT'S A
REBUTTABLE PRESUMPTION.
SO THERE'S NO SHIP THERE.
IT'S WHERE IT ALWAYS SAYS.
BUT FROM THE OTHER SIDE OF THE

MANUFACTURER DOESN'T COMPLY,
THEN THE BURDEN SHIFTS TO THE
MANUFACTURER TO SHOW A LACK OF
DEFECT OR NEGLIGENCE.

>> I GUESS THE ISSUE ON THIS ONE
IS THAT THAT STATUTE IS THE
LEAST AS IT COMPLIES IS PRESUMED
TO BE NOT AFFECT THEIRS.
IF SUBSTANCE CHANGED IN THE LAW.
I MEAN, I RUINED HER WITH MAKING
THE ARGUMENT, IT DOESN'T MATTER.
THE GOVERNMENT RULES OF THE FOUR
THAT HAS NOTHING TO DO WITH A
PRODUCT IS DEFECT IS.

SO I JUST WISH THIS CASE WOULD
COME UP AS A CASE SO WE CAN
DECIDE THE ISSUES AND TRY AND
FIGURE IT OUT IN THE JURY
INSTRUCTIONS, BUT IT WASN'T
RIGHT?

WE HAVE NOT SEEN THIS ISSUE IN
11 YEARS.

RIGHT NOW, IT'S ONLY COME UP IN
FEDERAL COURTS AN APPEAL.

>> I MEAN, NOBODY'S LITIGATING?

>> YES, BUT --

>> WOULD'VE A CERTIFIED QUESTION
FROM THE 11th CIRCUIT SOMEDAY.

>> I BELIEVE IF WE AREN'T ACTING
FOR A CASE BECAUSE THE
LEGISLATURE HAS SAID WHAT THE
LAW IS.

>> I SHOULD SAY THE STATUTE
ITSELF IS A CHANGE IN THE
SUBSTANTIVE LAW BUT IT SHOULD BE
GIVEN EFFECT TO RICHARD
INSTRUCTION.

>> CORRECT BECAUSE OTHERWISE IT
IS A MERIT MEANING REALLY.
UNLESS THERE IS A JURY
INSTRUCTION ON IT.

[INAUDIBLE]

>> CORRECT.

AND WHEN THEY AREN'T, THEY'RE
SANE WHILE IT'S NOT A STANDARD
JURY INSTRUCTION, SO I KIND OF
GOES IN A CIRCLE.

AND WITHOUT THE JURY
INSTRUCTION, I THINK IT'S GOING
TO CONTINUE TO GO THAT WAY SINCE

THE STATUTE IS TO NUMB THE LOOK FOR SUCH LONG TIME.

AND I DO THINK IN OUR SUBMISSION WE POINT OUT THAT THE LEGISLATURE WAS THINKING ABOUT JURY INSTRUCTIONS AND ENACT THIS VERY STATUTE.

AND I THINK IT'S BEEN POINTED OUT THAT THERE IS NEGLIGENCE PER SE AND THE COMMITTEE NOTES SHOW THAT THE LEGISLATURE SAID WELL IT'S A ONE-WAY STREET IF SOMEONE VIOLATES THE STATUTE, THERE'S AN INSTRUCTION ON THAT.

WHAT IF THEY COMPLY WITH STATUTE STANDARDS RULES, SHOULDN'T THERE BE AN INSTRUCTION ON THAT? AND THAT IS HOW THIS WHOLE THING GOT STARTED.

SO OBVIOUSLY, THE VERY IDEA OF PASSING THIS IN THE MINDS OF THE LEGISLATORS WAS SO THAT THERE COULD BE A JURY INSTRUCTION AND WE THINK THAT GIVING THE INSTRUCTION IS CONSISTENT WITH LEGISLATIVE INTENT.

>> IN THANK YOU VERY MUCH FOR YOUR COMMENTS HERE TODAY ALSO. I'M GOING TO LEAVE A MINUTE OR HALF FOR REBUTTAL.

>> I WAS LOOKING TO ADDRESS THE LAST ISSUE IN SPITE OF THE COMMITTEE DECIDE

[INAUDIBLE]

[INAUDIBLE]

>> YOUR HONOR, THE COMMITTEE STRUGGLED WITH WHETHER WAS THE TYPE OF PRESUMPTION ABOUT WHAT SHE WOULD INSTRUCT THE JURY AND FINDING NO EVIDENCE IN THE STATUTE CODE WITH A BURDEN SHIFTING PRESUMPTION MAKES THE

MAJORITY OF THE COMMITTEE VOTED
NOT TO HAVE THE INSTRUCTION.
WHAT WE DID DO IS PROVIDE A NEW
NOTE ON USE SAYING ALTHOUGH
WE'RE NOT PROPOSING AN
INSTRUCTION, WE KNOW THAT THIS
ISSUE IS OUT OF YOUR AND RELATED
TO THE PARTIES TO MAKE THE

ARGUMENT FOR INSTRUCTION IN A GIVEN CASE HOPING THAT WHAT TOM TO CASE AND CONTROVERSY TO COME UP WITH THE COURT.

I DO WANT TO BRIEFLY DISCUSS THE MERGER APPEAL FOR AND FIVE BECAUSE THERE WERE PEOPLE WHO COMMENTED FOR PEOPLE IN FAVOR OF THAT MURDER AND THAT'S A SEPARATE ISSUE FROM THE RISK-BENEFIT ISSUE.

JUDGE FARMER, CHAIR OF THE SUBCOMMITTEE AND FELT HIS OWN COMMENTS AS A MAJOR PROPONENT OF MERGING THOSE TWO AND THE REASON WAS HIS VERY THAT THERE WAS NO BURDEN ON THE THING IS TO PROVE WHETHER WAS A MANUFACTURING DEFECT OR A DESIGN DEFECT AND THAT WAS REALLY JUST A CONSTRUCT THAT LAWYERS USED, THINKING ONE WAY OR THE OTHER.

>> YOU THINK NOW SOME OF THE TEST JUST DON'T APPLY.

>> AND WE DEFINITELY HAD CONCERNS IN THE COMMITTEE THAT THE CONFUSION ISSUE.

JUDGE FARMER NOTED WHEN A PRODUCT IS THIS MUCH DEBATED TO COMPROMISE ON THE SIDE.

I WANT TO NOTE THAT THE FJA COMES THAT PAGE FIVE AND 62 SUPPORT THE MURDER OF FOUR AND FIVE SO I THINK THERE WAS SOME CONVERSION CONFUSION.

THAT LEADS US INTO THE SHOW SHOULD RISK-BENEFIT BE IN THERE.

THESE REALLY ARE TWO SEPARATE ISSUES IN THE COURT COULD SEPARATE OR MERGE PO FOUR AND FIVE INSIGHTFULLY ADDRESS THE BENEFIT QUESTION ABOUT WHETHER

IT SHOULD BE IN THERE.
DEPENDING FOR THE DEVELOPMENTS
IN THE LAW CONSTRUCT IS
SOMETHING THAT THE COMMITTEE IS
USED IN THE PAST WHEN WE'VE
IDENTIFIED ISSUES WERE WITHOUT
THE LAW WAS NOT SETTLED IN
RECOGNIZING OUR JOB IS HARD TO

MAKE LAW IN THE COMMITTEE,
HOPING TO AT LEAST GIVE THEM THE
COMFORT LAW.

SOMETIMES THEY WON'T GET THE
INSTRUCTION IF I IF I PUT THE
NOTE ON USE AND THEY'RE SAYING
WE'RE NOT SURE.

GIVES TRIAL JUDGES THE COMFORT
TO MAKE THE RULING AND LET THE
LAW DEVELOPED, SO THAT'S THE
PURPOSE OF USING THEM.

IF THERE'S ANY OTHER QUESTIONS
I'D BE HAPPY TO DO SO, BUT MY
TIME IS UP.

>> OKAY, THANK YOU GOOD ACCORD
LIKE TO ECHO THE COMMENTS OF
JUSTICE LEWIS THAT WE ALL
APPRECIATE ALL THE WORK THAT HAS
GONE ON OVER THE YEARS AND ARE
QUESTIONS ABOUT IT IS NOT A
REFLECTION THAT WE DON'T
APPRECIATE IT BECAUSE WE
CERTAINLY DO AND WE KNOW THAT IT
IS HARD WORK IN THESE COMMITTEES
TO COME UP WITH THESE
INSTRUCTIONS FOR THE CORE.
SO WE REALLY APPRECIATE THE HARD
WORK ALONG YOU.

THANK YOU.

>> CAN WE GIVE YOU BACK A
NOTEBOOK?

[LAUGHTER]

>> THANK YOU.