

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

Ten years after the Indiana General Assembly amended the Indiana Product Liability Act (“IPLA”)¹ in 1995, Indiana judges and product liability practitioners continue to explore and define the IPLA’s contours and requirements. The 2004 survey period² is a robust reminder that there is more work to do in this area, perhaps even by the General Assembly.

This survey does not attempt to address in detail all Indiana product liability cases decided during the survey period.³ Rather, it examines selected cases that are representative of the important product liability issues. This survey also provides some background information, context, and commentary where appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.⁴ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁵

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1. This survey article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

2. The survey period is October 1, 2003 to September 30, 2004.

3. There were many cases during the survey period that are not treated in detail here even though they involved substantive product liability allegations, either because they are unpublished or because they involve only procedural issues. *E.g.*, *Jennings v. AC Hydraulic A/S*, 383 F.3d 546 (7th Cir. 2004) (affirming the district court’s dismissal because the manufacturer’s contacts with Indiana were insufficient to establish personal jurisdiction in a case involving an allegedly defective floor jack); *Hunt v. Unknown Chem. Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138 (S.D. Ind. Nov. 5, 2003) (holding that claims involving an allegedly defective lumber treated with chromium copper arsenate were preempted because the failure to warn claims constituted a “requirement” for labeling or packaging that was “in addition to or different from” those required by the Federal Insecticide, Fungicide, and Rodenticide Act).

4. Act of Apr. 21, 1983, 1983 Ind. Acts 297.

5. Act of Apr. 26, 1995, 1995 Ind. Acts 278. *See Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought.⁷ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also in the class of persons that the seller should reasonably foresee as being subject to the harm caused;⁸ (2) a defendant that is a manufacturer or a seller engaged in the business of selling a product;⁹ (3) physical harm caused by a product;¹⁰ (4) a product that is in a defective condition unreasonably dangerous to a user or consumer or to his property;¹¹ and (5) a product that reached the user or consumer without substantial alteration in its condition.¹² Indiana Code

6. The current version of the IPLA is found at Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1 (2004).

8. Indiana Code section 34-20-1-1(1) identifies proper IPLA claimants as "users" or "consumers." This section also contains the additional requirement of being in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." *Id.* § 34-20-2-1(1).

9. *Id.* § 34-20-1-1(a) (identifying proper IPLA defendants as "manufacturers" or "sellers"). The additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product" is found within Indiana Code section 34-20-2-1(2), thus effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability. *Id.* § 34-20-2-1(2).

10. *Id.* § 34-20-1-1(3) (requiring "physical harm caused by a product").

11. *Id.* § 34-20-2-1 (containing the requirement that the product at issue is "in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property").

12. *Id.* § 34-20-2-1(3) (containing the requirement that the product at issue "is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable"). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff's burden of proof in a product liability action. It requires a plaintiff to prove each of the following propositions by a preponderance of the evidence: (1) The defendant was a manufacturer of the product (or part of the product) alleged to be defective and was in the business of selling the product; (2) the plaintiff was in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition; (3) the defendant sold, leased, or otherwise put the product into the stream of commerce; (4) the product was in a defective condition unreasonably dangerous to users or consumers (or to the user's or consumer's property); and (5) the product was expected to and did reach the plaintiff without substantial alteration of the condition in which the product was sold by the defendant.

As written, Indiana Pattern Jury Instruction 7.03 is nearly accurate. It fails, however, to include the plaintiff's burden to prove, first, that he or she fits within the IPLA's definition of

section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements “regardless of the substantive legal theory or theories upon which the action is brought.”¹³

A. “. . . brought by a user or consumer. . .”

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.” For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.¹⁴

“User” has the same meaning as “consumer.”¹⁵ Several published decisions in recent years construe the statutory definitions of “user” and “consumer.”¹⁶

“user” or “consumer” in addition to being in the class of persons the defendant should reasonably have foreseen as being subject to the harm. It also fails to reflect the important requirement that a “physical harm” was in fact and proximately caused by the product at issue.

13. IND. CODE § 34-20-1-1. In the wake of the 1995 amendments to the IPLA, practitioners and sometimes judges have seemed to struggle with what the IPLA covers and what it does not. Indiana Code section 34-20-1-1 provides that the IPLA governs and controls all actions brought by users and consumers against manufacturers or sellers (under the right circumstances) for physical harm caused by a product “*regardless of the substantive legal theory or theories upon which the action is brought.*” *Id.* (emphasis added). Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA’s statutory definitions are not governed by the IPLA. *See, e.g., N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000)* (holding that a claim alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability and that plaintiff could proceed on a warranty theory so long as it was limited to a contract theory). At the same time, however, Indiana Code section 34-20-1-1 provides that the “[IPLA] shall not be construed to limit any other action from being brought against a seller of a product.” IND. CODE § 34-20-1-1. That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-2 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover. *Id.* § 34-20-1-2; *see infra* text accompanying notes 242-48.

14. IND. CODE § 34-6-2-29.

15. *Id.* § 34-6-2-147.

16. *See Butler v. City of Peru, 733 N.E.2d 912 (Ind. 2000)* (holding that a maintenance

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition.”¹⁷ Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken.¹⁸ In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

For a discussion of the noteworthy *Vaughn v. Daniels Co.*¹⁹ case, see last

worker could be considered a “user or consumer” of electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Electric America, Inc.*, 713 N.E.2d 275 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes).

17. IND. CODE § 34-20-2-1(1). Indiana Code section 34-20-2-1 imposes liability when: a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.

18. It is important to recognize the distinction between the “reasonable foreseeability” test employed pursuant to Indiana Code section 34-20-2-1(1) and the wholly separate and distinguishable “reasonableness” components of Indiana Code sections 34-20-4-1, -4-3, and -4-4. Indiana Code section 34-20-4-1 provides that a product is in a “defective condition” if “at the time it is conveyed by the seller to another party, it is in a condition . . . not contemplated by reasonable persons among those considered expected users or consumers of the product.” *Id.* § 34-20-4-1. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].” *Id.* § 34-20-4-3. Indiana Code section 34-20-4-4 incorporates the same premise: “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.” *Id.* § 34-20-4-4.

Indiana Code section 34-20-4-1 employs a “reasonableness” test to measure the condition of the product relative to its risks among persons already *considered expected users or consumers*. Similarly, Indiana Code sections 34-20-4-3 and -4-4 employ a “reasonableness” test to determine whether the product is handled and consumed in expectable ways. These analyses are separate and distinct from an examination that employs “reasonableness” as a guidepost for a user’s or consumer’s foreseeability as a potential IPLA plaintiff.

19. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh’g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003).

year's survey article.²⁰ The *Vaughn* case is before the Indiana Supreme Court pending a transfer decision. However, the current survey period did not produce noteworthy cases on the interpretation of who qualifies as IPLA claimants.

B. "... against a manufacturer or seller ..."

For purposes of the IPLA, "manufacturer" means "a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer."²¹ "Seller" means "a person engaged in the business of selling or leasing a product for resale, use, or consumption."²² Indiana Code section 34-20-2-1(2) of the IPLA employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the "seller" is "engaged in the business of selling the product."²³

Sellers can be held liable as manufacturers in two ways. First, if the seller fits within Indiana Code section 34-6-2-77(a)'s definition of "manufacturer," which expressly includes a seller who:

- (1) has actual knowledge of a defect in a product;
- (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;
- (4) is owned in whole or significant part by the manufacturer; or
- (5) owns in whole or significant part the [name of the actual] manufacturer.²⁴

Second, a seller can be deemed a statutory "manufacturer" and, therefore, be held liable to the same extent as a manufacturer, in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a "manufacturer" if the court is "unable to hold jurisdiction over the manufacturer" and if the seller is the manufacturer's principal distributor or

20. Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1249-57 (2004).

21. IND. CODE § 34-6-2-77.

22. *Id.* § 34-6-2-136.

23. *Id.* § 34-20-2-1(2). *See, e.g.*, *Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002) (recognizing that Indiana Code section 34-20-2-1 imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a "manufacturer" or "seller"); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a "manufacturer" of the plant).

24. IND. CODE § 34-6-2-77(a).

seller.²⁵

There is one other important provision about which practitioners must be aware when it comes to liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”²⁶ Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller,” and cannot be deemed a “manufacturer,” is not liable, and is not a proper IPLA defendant.²⁷

The Indiana Supreme Court’s decision in *Kennedy v. Guess, Inc.*²⁸ addresses the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. In *Kennedy*, Kaye Kennedy purchased a “Guess” watch at a Lazarus department store in Indianapolis.²⁹ As a gift for purchasing

25. *Id.* § 34-20-2-4. In *Goines v. Federal Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002), the court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to “personal jurisdiction.” The court refused to resolve the issue, deciding instead simply to deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Goines*, 2002 U.S. Dist. LEXIS 5070 at *15-16.

26. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

27. In *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. *Id.* at 725-26. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA, because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels), and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “A product liability action [*based on the doctrine of strict liability in tort*] may not be commenced or maintained. . . .” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 provides that “strict liability in tort” applies now only to IPLA cases based on a manufacturing defect. Indiana Code section 34-20-2-2 unequivocally provides that strict liability does not apply to warning or design claims, which are controlled by a negligence standard. Thus, if indeed the phrase “strict liability” means “liability without regard to the exercise of reasonable care,” then the only theory to which such a standard applies is a manufacturing defect theory. *See, e.g.*, *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002).

28. 806 N.E.2d 776 (Ind. 2004), *aff’g in part and rev’g in part* 765 N.E.2d 213 (Ind. Ct. App. 2002).

29. *Id.* at 779.

the watch, she received a free umbrella also bearing the “Guess” logo.³⁰ Over a year later, Kaye’s husband, Richard, took the umbrella to work, where a co-worker swung it from the handle.³¹ The umbrella’s shaft separated from the handle and struck Richard in the nose.³²

Asserting both negligence and strict liability theories of recovery, the plaintiffs sued Guess, Inc. (“Guess”), which had licensed rights to Callanen International Inc. (“Callanen”) to market products bearing the Guess logo, including the watch and the umbrella at issue.³³ Plaintiffs also sued the umbrella’s Hong Kong-based manufacturer, Interasia Bag Manufacturers, Ltd. (“Interasia”), and its domestic distributor in New York, Interasian Resources, Ltd. (“Interasian”).³⁴ Plaintiffs were never able to successfully serve process on Interasia.³⁵

The trial court granted motions for summary judgment filed by Callanen and by Guess, determining that neither entity could be held “strictly” liable because neither was a manufacturer of the umbrella under the IPLA.³⁶ The Indiana Court of Appeals reversed, holding that none of the parties sufficiently designated evidence to establish the application of Indiana Code section 34-20-2-4.³⁷ The Indiana Supreme Court affirmed in part and reversed in part.³⁸

The first of two issues as phrased by the *Kennedy* court was “how the burden of establishing the presence of any genuine issue of material fact operates with respect to a statutory provision treating the ‘principal distributor or seller’ as a manufacturer.”³⁹ Acknowledging the statutory language in Indiana Code section 34-20-2-1 and Indiana Code section 34-20-2-3, the *Kennedy* court confirmed that, “[a]ctions for strict liability in tort are limited to *manufacturers* of defective products.”⁴⁰

Callanen and Guess argued that they were not “manufacturers” of the umbrella, nor were they principal distributors or sellers. In support of their argument, Guess and Callanen submitted affidavits from managerial employees to show that none of the factual predicates for the statutory exceptions under which a seller can be deemed a “manufacturer” were met.⁴¹ The affiants also stated that neither Guess nor Callanen had any ownership interest in, nor were they owned in whole or significant part by, Interasia or Interasian (the umbrella’s

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Kennedy v. Guess*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002), *aff’d in part and rev’d in part*, 806 N.E.2d 776 (Ind. 2004).

38. 806 N.E.2d at 779.

39. *Id.*

40. *Id.* at 780.

41. *Id.*

undisputed manufacturer and domestic distributor).⁴² If un rebutted, the *Kennedy* court determined, such evidence would have warranted summary judgment under Indiana Code section 34-20-2-3.⁴³ According to the Kennedys, however, they were entitled to keep Guess and Callanen in the lawsuit by virtue of Indiana Code section 34-20-2-4, which, as noted above, imposed liability by treating certain parties as though they were manufacturers if two conditions were met: “(1) the court was unable to hold jurisdiction over Interasia, the actual manufacturer; and (2) Callanen and Guess were Interasia’s principal distributor or seller.”⁴⁴

In order to establish that the court could not hold jurisdiction over Interasia, the Kennedys designated evidence that upon trying to serve Interasia at an address in Hong Kong, the “affirmation of non-service” indicated that no such corporation existed at the address provided.⁴⁵ In addition, the Kennedys contended that evidence offered by Guess and Callanen demonstrated that Interasia had no contacts with Indiana and no knowledge that its umbrellas were to be sold in Indiana.⁴⁶

The *Kennedy* court wrote that the distributor exception found in Indiana Code section 34-20-2-4 “does not turn solely on whether a plaintiff achieves service of process, though the ability or inability to get service is certainly relevant.”⁴⁷ “Rather,” the court recognized, “the legislature has chosen to permit liability of a domestic distributor or seller when the ‘court is unable to hold jurisdiction’ over the actual manufacturer.”⁴⁸ And, although that is a “mixed question of fact and law,” Callanen and Guess, “on the record as far as it got developed here,” failed to come forward with evidence sufficient to affirmatively establish that the court could, indeed, hold jurisdiction over Interasia.⁴⁹

In order to establish the second of the two required evidentiary conditions, namely that Callanen and Guess were the principal distributors or sellers of the umbrella, the Kennedys designated the fact that the umbrella bore only a “Guess” logo.⁵⁰ They also presented invoices demonstrating that Callanen purchased more than 93,000 umbrellas from Interasia in 1996 and that Callanen purchased \$235,000 worth of rafts, binders, bags, umbrellas, agendas and coolers from

42. *Id.*

43. *Id.*

44. *Id.* at 781.

45. *Id.*

46. *Id.* The Kennedys pointed out that Callanen ordered the umbrellas from its Connecticut office through Interasia’s affiliate in New York and paid them from its Connecticut office. *Id.* The umbrellas themselves were shipped from Hong Kong to Callanen’s Connecticut office. *Id.* The Kennedy’s argued, therefore, that the umbrellas randomly found their way into Indiana through the marketing promotions of Callanen and Guess, which, the Kennedys contended, is an insufficient basis for exercising jurisdiction over Interasia under Indiana Trial Rule 4.4(A). *Id.*

47. *Id.* at 782.

48. *Id.*

49. *Id.*

50. *Id.*

Interasia between April and September 1996.⁵¹ According to the *Kennedy* court, “the volume of business” reflected in such evidence “sufficiently establishes a genuine issue of material fact as to whether Callanen is a ‘principal distributor.’”⁵²

Insofar as Guess was concerned, however, the evidence failed to show that Guess was a distributor or seller of any sort, principal or otherwise. “Guess neither ordered nor received the umbrellas at issue. It was never in possession of any of the umbrellas nor did it manufacture, supply, distribute, assemble, design, or sell them. Rather, Guess simply licensed its name to Callanen for placement on various products.”⁵³ Accordingly, the court concluded that “summary judgment in favor of Guess on this issue was proper.”⁵⁴

It is worth noting that the *Kennedy* court makes what appears to be a premature and potentially confusing determination. Specifically, the court concludes that summary judgment was inappropriate because both Guess and Callanen could be deemed “manufacturers” under Indiana Code section 34-20-2-4 solely by virtue of the fact that the Kennedys offered some evidence to suggest that Indiana may have personal jurisdiction over Interasia.⁵⁵ The relevant

51. *Id.* at 783.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 781. In order to establish that the court could not hold jurisdiction over Interasia, the Kennedys designated evidence that upon trying to serve Interasia at an address in Hong Kong, the “affirmation of non-service” indicated that no such corporation existed at the address provided. *Id.* In addition, the Kennedys contended that evidence offered by Guess and Callanen demonstrated that Interasia had no contacts with Indiana and no knowledge that its umbrellas were to be sold in Indiana. The Kennedys pointed out that Callanen ordered the umbrellas from its Connecticut office through Interasia’s affiliate in New York and paid them from its Connecticut office. *Id.* The umbrellas themselves were shipped from Hong Kong to Callanen’s Connecticut office. *Id.* The Kennedys argued, therefore, that the umbrellas randomly found their way into Indiana through the marketing promotions of Callanen and Guess, which, the Kennedys contended, is an insufficient basis for exercising jurisdiction under Indiana Trial Rule 4.4(A). *Id.* Though finding such evidence “not especially impressive,” the court believed it “potent enough to demonstrate a genuine issue of material fact on the question whether Callanen and Guess are manufacturers under the domestic distributor exception of [Indiana Code section 34-20-2-4].” *Id.*

The court rejected arguments offered by Callanen and Guess to the effect that the Kennedys used “less than diligent effort” to determine whether Interasia had moved to another location since the umbrellas were made for Callanen. *Id.* Specifically, Callanen and Guess pointed to the fact that the Kennedys attempted service based upon an address found in a 1996 memo, yet more recent documents reflected a different address for Interasia. *Id.* at 781-82. According to the *Kennedy* court:

The existence of another possible address is not enough by itself to rebut the inference that jurisdiction could not be obtained. . . . [B]ecause the general burden of proof falls on Callanen and Guess as movants under Trial Rule 56 there must be some additional evidence supporting their claim that the second address was a viable means to serve

question in this regard is whether the evidence generated by the Kennedys, although not overwhelming, is enough to create a genuine issue of material fact concerning whether an Indiana court might find a sufficient basis for exercising personal jurisdiction over Interasia. Assuming the answer to that question is “yes,” it does not automatically lead to the conclusion that there is a genuine issue of material fact about whether Callanen and Guess are manufacturers under Indiana Code section 34-20-2-4. Indeed, determining whether they are or are not manufacturers necessarily requires examination of the statute’s second requirement, namely whether those entities are Interasia’s principal distributor or seller.

Merely placing enough evidence in the record to create a fact question on the jurisdiction issue cannot be viewed as by itself sufficient to create a genuine issue of material fact about whether an entity is or is not subject to liability under Indiana Code section 34-20-2-4. A separate analysis, which the *Kennedy* court later employed, is also required to determine whether the entity against whom liability under Indiana Code section 34-20-2-4 is sought is the principal distributor or seller of the product at issue.

In the case of Callanen and Guess, it is undisputed that neither, in fact, manufactured the umbrella.⁵⁶ Moreover, there is no evidence that either of them fit within the statutory definition of Indiana Code section 34-6-2-77(a). Thus, Indiana Code section 34-20-2-4 provides the only basis for applying “strict” liability against them for a manufacturing defect in the umbrella.

Stated plainly, as defendants and summary judgment movants, Callanen and Guess had to designate evidence affirmatively establishing without genuine factual dispute: (1) that they are not Interasia’s principal domestic distributor or seller; or (2) that the court can, indeed, hold jurisdiction over Interasia. If either was unable to do so, summary judgment would be inappropriate and Indiana Code section 34-20-2-4 would allow a basis for a trier of fact to impose strict liability for a manufacturing defect in the umbrella. As it turned out, Callanen did neither. Guess ultimately avoided application of liability under Indiana Code section 34-20-2-4 because it was able to demonstrate without genuine factual dispute that it was not Interasia’s principal domestic distributor or seller.⁵⁷

C. “. . . for physical harm caused by a product . . .”

For purposes of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁵⁸ It does not include “gradually evolving damage to

process on Interasia.

Id. at 782.

56. *Id.* at 780 n.3.

57. *Id.* at 783. The second part of the *Kennedy* decision addressed whether Guess and Callanen could be liable based upon common law theories of liability outside the scope of the IPLA. See *infra* Part I.E.

58. IND. CODE § 34-6-2-105 (2004).

property or economic losses from such damage.”⁵⁹

For purposes of the IPLA, “product” means “any item or good that is personalty at the time it is conveyed by the seller to another party.”⁶⁰ The term does not apply to a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁶¹

A portion of the opinion in the case of *Baker v. Heye-America*,⁶² decided in December 2003, examines whether certain assembly activity resulted in the creation of a “product” under the IPLA. In that case, plaintiff Henry Baker worked at a glass bottle manufacturing facility, operating a machine that was built by defendant Heye-America according to specifications provided by Baker’s employer.⁶³ The machine formed glass bottles from molten glass. To cool the glass, a fan beneath the factory floor funneled wind into the machine through one of several types of wind appliances, including configurations known

59. *Id. See, e.g.,* Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 493 (Ind. 2001) (finding personal injury and property damage to other property from a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 486 (Ind. 2001) (finding no recovery under IPLA where claim is based on damage to the defective product itself); Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (involving a case brought by a couple against a condom manufacturer in which the court denied a motion to dismiss, determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *see also* Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc., No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830 (S.D. Ind. Apr. 29, 2002) (finding no recovery under IPLA in case involving motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

60. IND. CODE § 34-6-2-114.

61. *Id. E.g.,* R.R. Donnelley & Sons Co. v. N. Tex. Steel Co., 752 N.E.2d 112, 121-22 (Ind. Ct. App. 2001) (holding that manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); Marsh v. Dixon, 707 N.E.2d 998 (Ind. Ct. App. 1999) (finding that an amusement ride involved the provision of a service and not the sale of a product); Lenhardt Tool & Die Co. v. Lumpe, 703 N.E.2d 1079, 1085-86 (Ind. Ct. App. 1998) (finding that defendant provided products and not merely services because it transformed metal block into “new” products and because it repaired damaged products, both of which created “new,” substantially different work product); N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (finding that installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *see also* Great N., 2002 U.S. Dist. LEXIS 7830 (involving a fire that destroyed a motor home in which plaintiff insurance carrier attempted to state a claim for negligent inspection against defendant separate and apart from IPLA which the court rejected, determining that no reasonable juror could determine that the allegedly negligent inspection occurred as part of a transaction for “services” separate and apart from the purchase of the motor home).

62. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

63. *Id.* at 1137-38.

as “stacked wind” and “tube wind.”⁶⁴ On November 24, 1998, Baker was utilizing stacked wind to cool the bottles.⁶⁵ He realized that some of the bottles were of uneven thickness, which he attributed to a problem with the amount of wind blowing into the machine.⁶⁶ As he was using his hand to test the wind velocity on the output side of the machine, the mold opened, pinning his hand between the mold and the stacked wind appliance.⁶⁷ Baker and his wife sued Heye-America and Emhart Glass Manufacturing, Inc., the manufacturer of the machine’s control components. The trial court granted summary judgment to both Heye-America and Emhart.⁶⁸ The Bakers appealed.

The first issue raised on appeal was whether Heye-America’s assembly of the machine at issue created a product for purposes of the IPLA.⁶⁹ The designated evidence showed that the machine was rebuilt partially from refurbished parts.⁷⁰ Other evidence showed that Heye-America built the machine for Baker’s employer through an “interactive process” between the two entities.⁷¹ Heye-America apparently employed an engineer but no design professionals.⁷² The director of machine development for Baker’s employer testified that the machine was created and constructed by Heye-America.⁷³ Heye-America’s vice president and general manager testified that such machines are customized to the specifications of the customer and that the person in charge of the assembly shop at Heye-America would have been responsible for refining the specifications when it was rebuilt and assembled.⁷⁴

Relying heavily on *Lenhardt Tool & Die Co. v. Lumpe*,⁷⁵ the *Baker* court

64. *Id.* at 1138.

65. *Id.* at 1137-38.

66. *Id.* at 1138.

67. *Id.*

68. *Id.*

69. *Id.* at 1140.

70. *Id.* at 1141.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 703 N.E.2d 1079 (Ind. Ct. App. 1998). In *Lenhardt*, the Indiana Court of Appeals concluded that a company that machined blocks of metal into molds by following the designs found in specifications from its customer could be considered a manufacturer of a product under the IPLA because the process transformed metal blocks into new products that were substantially different from the raw material used. Because the repair of a damaged mold could be either the creation of a new product or the service of repairing the original product, depending upon the amount of work required, a genuine issue of material fact existed as to whether the alleged defective product had been created or serviced by the defendant. *Id.* at 1085-86. See also *R.R. Donnelly & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112 (Ind. Ct. App. 2001) (using *Lenhardt* analysis to determine that the defendant was a manufacturer under IPLA where it transformed raw material into a new product that was substantially different from the raw material used).

concluded that the machine at issue is a “product” covered by the IPLA.⁷⁶ In support of its conclusion, the court reasoned that the rebuilding process was “a substantial and complicated one that resulted in a complex new machine that was significantly different from its parts.”⁷⁷ According to the *Baker* court: “Heye-America did more than simply provide the service of restoring [the machine] from a damaged condition. Rather, through an interactive process with [Baker’s employer], Heye-America designed and produced a custom product that it placed in the stream of commerce.”⁷⁸

D. “. . . any product in a defective condition unreasonably dangerous . . .”

Only products that are in a “defective condition” are products for which liability may attach pursuant to the IPLA. For purposes of the IPLA, Indiana Code section 34-20-4-1 provides that a product is in a “defective condition” if

at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.⁷⁹

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”); (2) the product lacks adequate or appropriate warnings (a “warnings defect”); or (3) the product has a defect in its design (a “design defect”).⁸⁰

Although claimants are free to assert one of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products, as a matter of law, are not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not

76. *Baker*, 799 N.E.2d at 1141.

77. *Id.*

78. *Id.*

79. IND. CODE § 34-20-4-1(2004). See *Baker*, 799 N.E.2d at 1140 (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.”); *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999).

80. See *First Nat’l Bank v. Am. Eurocopter Corp.*, 378 F.3d 682, 689 (7th Cir. 2004); *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

reasonably expectable, the seller is not liable under [the IPLA].”⁸¹ In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁸²

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of Indiana Code section 34-20-4-1(2). A product is “unreasonably dangerous” only if its use exposes the user or consumer to a risk of physical harm beyond that contemplated by the ordinary user or consumer who purchases it with ordinary knowledge about the product common to consumers in the community.⁸³ A

81. IND. CODE § 34-20-4-3. The most recent case discussing “reasonably expectable use” is an unpublished decision by Judge Larry McKinney. *See* *Hunt v. Unknown Chem. Mfr. No. One*, 2003 U.S. Dist. LEXIS 20138 (S.D. Ind. Nov. 5, 2003). There, Gary Hunt purchased from Furrow Building Materials (“Furrow”) lumber treated with chromium copper arsenate (“CCA”). *Id.* at *2. The chemical treatment waterproofs lumber and protects it from damage from wood-boring insects. *Id.* Hunt used the wood primarily to construct a deck around a swimming pool. *Id.* at *4. Hunt then sold the home to the plaintiffs, who tore down the deck, burned the wood in the backyard, and spread the ashes as fertilizer in the family garden. *Id.* Plaintiffs filed suit after learning “about the dangers resulting from exposure to CCA-treated wood.” *Id.*

Judge McKinney cited Indiana Code section 34-20-4-3 for the proposition that manufacturers (as defined by the IPLA) can only be held liable for injury or damage caused by a product’s reasonably expectable use. *Id.* at *27-28. He also recognized that Indiana cases such as *Wingett v. Teledyne Industries, Inc.*, 479 N.E.2d 51 (Ind. 1985) and *Douglass v. Irvin*, 549 N.E.2d 368 (Ind. 1990), contemplate that some activities or actions relative to a product (demolition of ductwork in that case) are simply not “foreseeable” as a matter of law and, accordingly, are not “intended” or expected uses of the product. *Id.* at *28-29. Applying Indiana law to the facts before him, Judge McKinney recognized that the intended use of the treated wood that Gary Hunt bought from Furrow was the construction of decks and other structures. *Id.* at *31. He did, in fact, use the wood to construct and repair a swimming pool deck. *Id.* at *32. Such use was not, however, the basis of plaintiffs’ claim. Rather, the claims stem from the burning of the treated wood at issue. *Id.* Accordingly, Judge McKinney concluded that “[p]laintiffs’ destruction of the wood and their post-destruction use of the wood ashes as ‘fertilizer’ for the yard were not reasonably foreseeable uses of the product.” *Id.*

82. IND. CODE § 34-20-4-4.

83. *See id.* § 34-6-2-146; *see also* *Baker*, 799 N.E.2d at 1140; *Cole*, 714 N.E.2d at 199. In *Baker*, a 2003 decision, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is usually a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added). Another panel wrote the same thing in *Vaughn v. Daniels Co.*, 777 N.E.2d 1110, 1128 (Ind. Ct. App. 2002), *clarified on reh’g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003) (citing *Cole*, 714 N.E.2d at 200). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that “reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. . . . The manner of use required to establish ‘reasonably expectable use’ under the circumstances of each case is a matter peculiarly within the

product is not unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.⁸⁴

The “rule of liability” in Indiana Code section 34-20-2-1 provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁸⁵ even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”⁸⁶ What Indiana Code section 34-20-2-1 bestows, however, in terms of liability despite the exercise of “all reasonable care [*i.e.*, fault],” Indiana Code section 34-20-2-2 removes for two of the three operative theories used to show

province of the jury.” 799 N.E.2d at 1140 (citing *Vaughn*, 777 N.E.2d at 1128).

It would be incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is “reasonably expectable.” Indeed, recent cases have resolved the “defective” and “unreasonably dangerous” issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be in the installed position. With respect to his design claims, plaintiff’s expert opined that the saw was “defective” and “unreasonably dangerous” by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* See also *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. Oct. 15, 2002) (finding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time they were introduced into the stream of commerce).

84. See *Baker*, 799 N.E.2d at 1140; see also *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (finding that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “[T]o be unreasonably dangerous, a defective condition must be hidden or concealed . . . [and] evidence of the open and obvious nature of the danger . . . negate[s] a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co., Inc.*, No. TH-01-0237-C-T/H, 2003 U.S. Dist. LEXIS 17177, at **7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 99). In *Hughes*, plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. Plaintiff admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at **3-4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

85. IND. CODE § 34-20-2-1.

86. *Id.* § 34-20-2-2.

a defect. Chapter 2, section 2 eliminates the privity requirement between buyer and seller for imposition of liability and also confirms that a manufacturer's or seller's exercise of reasonable care eliminates liability in cases in which the theory of liability is design defect or warning defect:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.⁸⁷

Indiana courts and commentators routinely have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.⁸⁸ Thus, just as in any other negligence case, a claimant utilizing design or warnings theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁸⁹

Many courts have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.⁹⁰ Even though Indiana is now ten years removed from the 1995 amendments to the IPLA, some courts and practitioners continue to use erroneous language implying that "strict liability" and/or "liability without regard to reasonable care" still applies to cases in which the operative theory of liability is based upon inadequate warnings or improper design.⁹¹

87. *Id.*

88. See *Burt*, 212 F. Supp. 2d at 899-900; Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 999 (1996) ("The effect of [Indiana Code section 34-20-2-3 and section 34-20-2-4] is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer.").

89. See *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 783 (2004).

90. See, e.g., *First Nat'l Bank v. Am. Eurocopter Corp.*, 378 F.3d 682, 689 n.4 (2004) ("Both Indiana's 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles."); *Burt*, 212 F. Supp. 2d at 899-900; *Kennedy*, 765 N.E.2d at 220; *Miller v. Honeywell Int'l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (finding the standard for liability in design defect cases is a negligence standard).

91. The most recent example is found in *Ziliak v. AstraZeneca LP*, 324 F.3d 518 (7th Cir. 2003). Although not relevant to the court's ultimate decision, the *Ziliak* decision proclaimed that "manufacturers are *strictly liable* to consumers for injuries caused by defective or unreasonably dangerous products placed in the stream of commerce." *Id.* at 521 (emphasis added). A few sentences later, the court again incorporated strict liability into its analysis: "AstraZeneca is absolved of *strict liability* so long as it has imparted adequate warnings to treating physicians." *Id.*

In addition, the Indiana Pattern Jury Instructions fail to correctly follow the IPLA in this regard. The pattern jury instructions do not adequately distinguish between the operative theories to which negligence standard should apply (warning defect and design defect) and the operative theory to which a strict liability (“liability without regard to reasonable care”) standard should apply (manufacturing defect). Specifically, Pattern Instruction 7.04 does not track the language of Indiana Code section 34-20-2-2, which requires an IPLA claimant utilizing a design or warning defect theory to establish that “the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.”⁹²

1. *Warning Defect Theory*.—The IPLA contains a specific statutory provision covering the warning defect theory; it states that:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.⁹³

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.⁹⁴

Indiana courts have been active in recent years in resolving cases espousing warning defect theories.⁹⁵ The latest warning defect theory case comes from the

(emphasis added). In support of its assumption of strict liability, the *Ziliak* court cites Indiana Code section 34-20-2-1. *Id.*

Because *Ziliak*’s cause of action accrued in November 1998, there is no question that the case is governed by the current version of the IPLA, which was enacted in 1995. Although, as the *Ziliak* court recognized, it is true that the “rule of liability” established by Indiana Code section 34-20-2-1 applies even though a seller has exercised all reasonable care in the manufacture and preparation of the product (the rule of strict liability), Indiana Code section 34-20-2-2 eliminates the rule of liability without regard to reasonable care in all cases in which the theory of liability is inadequate warnings or improper design.

Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396, 405-06 (Ind. Ct. App. 1999), is a case in which the Indiana Court of Appeals found no error in the trial court’s use of the term “strict liability” in its instructions to the jury even though the case was not limited to manufacturing defects.

92. IND. CODE § 34-20-2-2 (2004).

93. *Id.* § 34-20-4-2.

94. *First Nat’l Bank*, 378 F.3d at 690 n.5.

95. In *Birch v. Midwest Garage Door Systems*, 790 N.E.2d 504 (Ind. Ct. App. 2003), a young girl sustained serious injuries when the door of the garage closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. The court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type

Seventh Circuit, *First National Bank & Trust Corp. v. American Eurocopter Corp.*⁹⁶ There, a helicopter rotor blade struck and killed Conseco general counsel Lawrence Inlow. The accident occurred as he passed in front of the helicopter after disembarking at the Indianapolis International Airport.

The helicopter involved was a Dauphin, manufactured by Eurocopter, a French corporation. At normal flight speeds, the helicopter's rotor blades are subject to centrifugal and lifting forces that raise the plane of the disk in which the blades rotate.⁹⁷ When the blades are not moving, they droop to about eight feet, two inches above ground level in front of the helicopter. When the blades are under power and the pilot's cyclic control⁹⁸ is in the neutral position, the blades may rise as high as nine feet, four inches above ground level in front of the helicopter.⁹⁹ The height of the rotor blades are marketed to Eurocopter's customers¹⁰⁰ as a safety feature and a convenience. There are, however, two

of system installed and that no additional information about garage door openers would have added to the plaintiffs' understanding of the characteristics of the product. *Id.* at 518-19.

In *Ziliak*, plaintiff developed glaucoma after taking a prescribed inhaled corticosteroid. The package inserts provided a warning that "rare instances of glaucoma, increased intraocular pressure, and cataracts have been reported following the inhaled administration of corticosteroids." 324 F.3d at 519. The district court granted summary judgment, finding that the manufacturer could not be held liable for plaintiff's injuries under Indiana's "learned intermediary" doctrine and because the warning accompanying the product was adequate as a matter of law. *Id.* at 520. The Seventh Circuit agreed that the warning was adequate as a matter of law and, accordingly, did not address the learned intermediary basis for the district court's decision. *Id.* at 520-21. In doing so, the Seventh Circuit recognized that some products, including pharmaceuticals, are "unavoidably unsafe" in that they are incapable of being made completely safe for their intended or ordinary use. *Id.* at 521 (citing *Moss v. Crosman Corp.*, 136 F.2d 1169, 1171 (7th Cir. 1998)). The court also pointed out that such products, properly prepared and accompanied by proper directions and warnings, are not defective, nor are they unreasonably dangerous. *Id.* (citing *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 545-46 (Ind. App. 1979)). See also *Burt*, 212 F. Supp. 2d at 901-02 (rejecting argument that saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared installed when in fact it was not and finding there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances since the scope of the duty to warn is determined by the foreseeable users of the product); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096, 1104 (Ind. Ct. App. 2001) (concluding that because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process, the trial court should have addressed whether the risks associated with use of product were unknown or unforeseeable and whether or not the defendants had a duty to warn of the dangers inherent in the use of the product).

96. 378 F.3d 682 (7th Cir. 2004).

97. *Id.* at 685.

98. The pilot grips the cyclic control with his right hand and thereby controls the degree of tilt in the rotor disk. *Id.* at 685.

99. *Id.*

100. Eurocopter's primary customers are business executives, medical personnel, law

ways in which the high-set rotor is counteracted: (1) when the pilot maneuvers the cyclic control to tilt the rotors¹⁰¹ and (2) when the blades flex up and down due to wind gusts or at lower revolutions-per-minute.¹⁰² Thus, as the *Inlow* court noted, “despite the high-set rotor . . . the Dauphin rotor blades pose grave danger to anyone within the circular path of the blades. . . . Notwithstanding the dangers of disembarking while the rotors are decelerating, Eurocopter did not directly warn anyone at Conseco of such risks.”¹⁰³ No such warnings were in the helicopter, and none were in the instruction manual.¹⁰⁴

After Conseco bought the Dauphin, its head of flight operations implemented what the court called an “imprudent disembarkation procedure that was concerned more with saving executive time and the level of engine noise than safety.”¹⁰⁵ Conseco CEO Stephen Hilbert “did not want to delay disembarking for the thirty-to-forty seconds it takes for the rotor blades to fully stop with the engines off, nor did he want to depart while the engines were running because the noise was extremely loud.”¹⁰⁶ Accordingly, Conseco developed a debarking policy that would allow passengers to exit the Dauphin after the engines had been shut down, but before the rotor blades had completely stopped.¹⁰⁷ Conseco pilots required passengers to exit the helicopter at a 90-degree angle to the helicopter so as to prevent them from stepping into the “most dangerous sector of the blades’ arc-in front of the helicopter.”¹⁰⁸

The Conseco pilots were well aware of the risks inherent in exiting a helicopter while the blades were decelerating.¹⁰⁹ In fact, the pilot on the day of the accident had overruled the Conseco policy when wind gusts were particularly strong. “Several pilots and mechanics also complained to their Conseco superiors on occasion about the practice.”¹¹⁰ Although uncomfortable with procedures because of their “general inclination toward taking all conceivable precautions,” the Conseco pilots confirmed that “this discomfort did not stem from any warnings issued by Eurocopter” but rather from “knowledge that ‘there was a potential for endangerment of passengers or personnel’” derived from “‘intuit[ion] or from military experience,’ not specific knowledge of how low the

enforcement, and offshore oil platform operators. *Id.*

101. Tilting the rotors enables the helicopter to move in the direction of the tilt. *Id.* When the cyclic is pushed to its absolute maximum forward position of thirteen degrees, the rotor blade can reach as low as five feet, two inches from the ground. *Id.*

102. The rotor blades are subject to “blade flap” because they are made of a non-rigid, lightweight carbon fiber material. *Id.* at 686.

103. *Id.* at 686-87.

104. *Id.* at 687.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

Dauphin blades actually could bend.”¹¹¹ Inlow was a frequent passenger on the Dauphin for five years before the fatal accident and had been warned “more than once” by pilots about walking in front of the Dauphin.¹¹² On the day of the accident, Inlow began to walk on roughly the correct path, then abruptly turned and walked fully upright in front of the helicopter into the path of the blades.¹¹³ The blades struck him at about the one o’clock position off the nose of the helicopter.¹¹⁴

The representative of the Inlow Estate sued Eurocopter, claiming it had failed to warn Inlow and Consecoco about the danger of the rotating rotor blades. The district court granted Eurocopter’s motion for summary judgment on three grounds:

- (1) that the danger that befell Inlow was open and obvious and therefore Eurocopter did not have a duty to warn Consecoco or Inlow of the danger;
- (2) that, even assuming the danger was not open and obvious because of the increased risk of blade flap during deceleration, the pilots in the employ of Consecoco served as sophisticated intermediaries who relieved Eurocopter of the duty to warn Consecoco or Inlow; and
- (3) that the Dauphin was not “unreasonably dangerous” under the [IPLA] and therefore the Inlow Estate could not proceed with the suit.¹¹⁵

The Seventh Circuit panel first recognized Indiana’s duty to warn reasonably foreseeable users of all latent dangers inherent in the product’s use.¹¹⁶ The court

111. *Id.*

112. *Id.* at 688. On one prior occasion, Inlow walked to the same spot where he was later killed. *Id.* A Consecoco pilot told him that it looked as if the blade came close to hitting him and that he needed to follow the exit procedure. *Id.* “Inlow acknowledged his understanding.” *Id.* On another occasion, Inlow was stopped before he could walk towards the front of the helicopter and was asked to proceed along the ninety degree exit path. *Id.*

113. *Id.*

114. *Id.* The pilot manning the controls in the cockpit said that nothing appeared to be unusual about the rotor blade path. *Id.* He testified that “it appeared that Inlow simply walked into the path of the blades, a place [the pilot] never expected anyone to be.” *Id.* The pilot’s testimony on that point is as follows:

Now, I know mentally that this thing is supposed to be eight feet tall. Larry is six feet tall. I can’t tell you where that two feet went. I know from my observation watching this thing spool down everything was correct. The cyclic was where it was—normally was. I was guarding it with my hand. The tip path plane was where it should have been. No vibrations. Everything looked good. Next thing I know I see Larry [Inlow] coming out of my peripheral vision. Now I’ve got something of a sight picture. I can see Larry’s not going to make it.

Id. at 688 n.2.

115. *Id.* at 688.

116. *Id.* at 690. Although not dispositive with respect to Eurocopter’s ultimate legal culpability, the *Inlow* court took the opportunity at the outset of its failure to warn discussion to point out that:

then recognized that there is no duty to warn of open and obvious dangers because a warning would be redundant.¹¹⁷ Thus, the first question the *Inlow* court identified was whether the danger presented by the Dauphin's rotor blades was open and obvious and, therefore, not latent or hidden.¹¹⁸ On that question, the court recognized that the dangers presented by rotors on some helicopters may be so obvious that no warning would be necessary or helpful.¹¹⁹ According to the court, however, it is not obvious that the Dauphin's high-set rotor provides reliable safety for exiting passengers only when it is turning at flight speed; this could lead to a "false sense of security in its users" who might buy it because of a perceived level of safety for inexperienced passengers.¹²⁰ As a result, the court determined as a matter of law that "[d]eceleration-enhanced blade flap is a hidden danger of the Dauphin for which Eurocopter had a duty to warn its customers, in this case, Conseco."¹²¹

The remainder of the court's opinion on the warning defect issue addressed whether Eurocopter breached that duty. Stated more plainly, "did Eurocopter adequately warn and/or instruct Conseco and Inlow on the dangers of the Dauphin and/or the proper use of the helicopter?"¹²² On that point, the district court held that Eurocopter satisfied its duty to warn as a matter of law in light of the sophisticated intermediary doctrine.¹²³ Indeed, although the duty to warn end users of potential dangers is usually not delegable, Indiana law recognizes the sophisticated intermediary (sometimes called the "learned intermediary")

There are many who could be blamed for this terrible accident. For one, Conseco did not thoroughly consider flight safety. Its executives could have investigated the best way to disembark, given more deference to the judgment of the helicopter pilots within the organization, or ensured that ground crews were present at every disembarkment. Second, the pilots could have reminded Inlow of the proper, 90-degree exit path, physically forced him to walk this path in light of his past behavior, or insisted that their instincts on flight safety should have been followed despite Conseco's flight policy. And, of course, Inlow himself decided to walk upright, directly in front of the helicopter.

Id.

117. *Id.*

118. *Id.*

119. *Id.* at 691. The example the court gave of a helicopter with a lower rotor set was the Sikorsky S-76, which, according to the court, has a rotor set at body height. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* The court acknowledged that the sophisticated intermediary doctrine is similar to the sophisticated user exception to the duty to warn under Indiana law. *Id.* at 691 n.8 (citing *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 403 n.4 (Ind. Ct. App. 1999)). The court expressed difficulty in determining whether Inlow, as an individual passenger, is the end user of the product or whether Conseco, as an organization, is the end user. In resolving that quandary, the court wrote, "[w]e are inclined towards the former and therefore analyze the issue as a sophisticated intermediary case rather than a sophisticated user case." *Id.*

exception.¹²⁴ The doctrine applies if: “(1) the product is sold to an intermediary with knowledge or sophistication equal to that of the manufacturer; (2) the manufacturer adequately warns this intermediary; and (3) the manufacturer can reasonably rely on the intermediary to warn the ultimate consumer.”¹²⁵ Additional factors should be considered as well, including:

The likelihood or unlikelihood that harm will occur if the intermediary does not pass on the warning to the ultimate user, the [] nature of the probable harm, the probability or improbability that the particular intermediary will not pass on the warning[,] and the ease or burden of the giving of the warning by the manufacturer to the ultimate user.¹²⁶

Simply put, if the foregoing conditions are satisfied, a manufacturer is deemed not to have breached its duty to warn.

In the *Inlow* case, the court was satisfied that the evidence supported a finding as a matter of law that the sophisticated intermediary doctrine applies to bar failure to warn liability. The evidence important to the court to sustain the judgment included the following points: (1) Consecos licensed, trained, professional staff of pilots understood the dangers of blade flap and that exiting the Dauphin while the blades decelerated posed significant dangers; (2) because information about blade flap was readily available to the Consecos pilots in their training and in materials familiar to them as professional pilots, any lack of direct warning by Eurocopter to the pilots would have been inconsequential; and (3) it was more than reasonable for Eurocopter to expect the pilots to pass on the warning to the Consecos executives.¹²⁷

In conclusion, the court wrote:

Inlow was directly warned more than once that tragedy could strike if he persisted in walking in front of the Dauphin when disembarking. The fact that Consecos and Inlow chose to ignore admonishments from the professional pilots does not alter the fact that the pilots are sophisticated intermediaries. No jury could find that it was unreasonable for Eurocopter to expect Consecos's pilots to understand rotor blade dangers and to protect Consecos passengers from those dangers. . . . [W]e agree with the district court in adding that Eurocopter may not be held liable as a matter of law under Indiana's sophisticated intermediary doctrine.¹²⁸

Because of the court's finding relative to the sophisticated intermediary doctrine,

124. *Id.* at 691.

125. *Id.*

126. *Id.* at 692 (quoting *Ritchie v. Glidden Co.*, 242 F.3d 713, 724 (7th Cir. 2001)).

127. *Id.* at 692-93. By way of illustration, the court pointed out that there were several industry sources recognizing the dangers presented by exiting or approaching a helicopter when the rotors were spinning, including a 1983 Federal Aviation Administration circular, Indiana's occupational safety regulations, the Safety Manual of the Helicopter Association International, and a 1992 training book entitled "Learning to Fly Helicopters." *Id.* at 692.

128. *Id.* at 693.

the court did not analyze the issue of proximate cause or the defense of incurred risk.¹²⁹

2. *Design Defect Theory*.—Indiana courts require plaintiffs in cases utilizing a design defect theory to prove what practitioners and judges often refer to as a “safer, feasible alternative” design. Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹³⁰ Judge Easterbrook has described that a design claim in Indiana is a “negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accident.”¹³¹

Indiana’s requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.¹³² In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard. As such, one could hardly find a manufacturer negligent for adopting a particular design unless one could prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. That necessarily means that the claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability.¹³³

In addition, the IPLA adopts comment k of the Restatement (Second) of Torts for all products and, by statute, “a product is not defective . . . if it is

129. *Id.* According to Judge Hamilton at the district court level, the helicopter was not “unreasonably dangerous” because, as a matter of law, it did not place Inlow at risk of injuries different in kind from those the average user might anticipate.

130. See *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995). The plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff’s expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. 212 F. Supp. 2d at 900. The court rejected the claim, holding that the plaintiff has “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* See also *Miller v. Honeywell Int’l Inc.*, No. IP98-1742-CMIS, 2002 U.S. Dist. LEXIS 20478, at *66 (illustrating the recognition of plaintiffs that design defect theory required proof of an alternative design that was effective, safer, more practicable, and more cost-effective than the one at issue).

131. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

132. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

133. By way of example, a manufacturer could not be held liable under the IPLA for adopting design “A” unless there was proof that through reasonable care the manufacturer would have instead adopted design “B.” To make that case, a claimant must show the availability of design “B” as an evidentiary predicate to establish that element first before proceeding to the other “reasonable care” elements.

incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”¹³⁴ As such, a manufacturer technically cannot make the “comment k” statutory defense available until and unless the claimant demonstrates a rebuttal to it. That raises interesting questions in light of Indiana’s quirky treatment of Rule 56¹³⁵ since *Jarboe v. Landmark Comm. Newspapers of Indiana, Inc.*¹³⁶ In federal court under a *Celotex*¹³⁷ standard, a manufacturer may file a summary judgment motion based upon the “comment k” defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana’s treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design. Nevertheless, and regardless of the procedure governing the motion itself, the claimant still must prove safer, feasible alternative design to rebut the IPLA’s “comment k” defense.

The *Baker v. Heye-America*¹³⁸ case is the Indiana Court of Appeals’ most recent published foray into the substantive world of defective design theory. Plaintiff Henry Baker injured his hand while operating a glass bottle manufacturing machine.¹³⁹ The machine formed molten glass into bottles by closing around them and then opening again.¹⁴⁰ The moving parts that form the bottles are referred to in the opinion as both “molds” and “blanks.”¹⁴¹ To cool the glass, a fan beneath the factory floor funneled wind into the machine through one of several types of wind appliances, including configurations known as “stacked wind” and “tube wind.”¹⁴² Baker realized that some of the bottles were of uneven thickness, which he attributed to a problem with the amount of wind blowing into the machine.¹⁴³ As he was using his hand to test the wind velocity on the output side of the machine, the mold opened, pinning his hand between the mold and the stacked wind appliance.¹⁴⁴

The Bakers alleged five ways in which they believed the glass molding machine was defective: (1) improper placement of the maintenance stop button; (2) lack of a guard on the maintenance stop button; (3) no practical release option was offered by the design if a person became trapped by the open mold; (4) the lack of a gauge for determining wind velocity, which required operators to test wind speed with their hands; and (5) placement of the basic wind

134. IND. CODE § 34-20-4-4 (2004).

135. IND. TRIAL R. 56.

136. 644 N.E.2d 118 (Ind. 1994).

137. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

138. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

139. *Id.* at 1138.

140. *Id.*

141. *Id.* at 1138 n.1.

142. *Id.* at 1138.

143. *Id.*

144. *Id.*

configuration.¹⁴⁵

It is important to point out that the plaintiffs specifically disavowed their intent to proceed on a warnings defect theory. According to the court, it considered “only whether the designated materials raise an issue of fact with regard to design or manufacturing defects.”¹⁴⁶ In reality, however, all of the operative theories upon which the plaintiffs proceeded in *Baker* are defective design theories. None of the theories, as stated, allege a defect in the manufacturing process because they espouse no problem with the functionality of the equipment or its failure to operate as designed. Rather, all theories allege risks created by the improper positioning and/or lack of operational, control, or safety mechanisms.

The Bakers alleged two defects related to the maintenance stop button. First, they claimed that stop button was located where it could be inadvertently activated by a worker’s knee.¹⁴⁷ Second, they alleged that it should have been designed with a guard.¹⁴⁸ With respect to the first theory, the court immediately recognized that “the designated evidence shows some disagreement about whether the maintenance stop button even played a role in Baker’s accident.”¹⁴⁹ Based upon the configuration and operation of the machine at the time Baker’s hand was freed, Baker’s supervisor testified that the maintenance stop button had been activated.¹⁵⁰ Baker himself, however, testified that he was certain he did not activate the maintenance stop button.¹⁵¹ Rather, he testified that he was properly positioned but the blanks opened prematurely because of an electrical malfunction. Baker also testified, contrary to his supervisor, that the machine shut down while he was trapped and that his co-workers had trouble getting the machine restarted after the accident.¹⁵² In addition, witnesses offered several conflicting opinions about why the blanks opened, including activation of the stop button, an electrical malfunction, faulty computer cards, power failure, and a mechanical failure in a hose or valve line or valve assembly.¹⁵³

After summarizing all of the various factual disagreements, the court concluded that there was “a genuine issue of material fact with regard to whether Baker even activated the maintenance stop button, and if so, whether its

145. *Id.* at 1141-42.

146. *Id.* at 1140.

147. *Id.* at 1142.

148. *Id.* at 1143.

149. *Id.*

150. *Id.* Baker’s supervisor freed Baker’s hand by releasing the stop button and activating two start buttons, causing the machine to cycle and, in turn, the blank to close. *Id.* Baker’s supervisor deduced that the stop button had been activated because each section of the machine has its own maintenance stop button and, that during Baker’s accident, the other sections of the machine continued to operate. *Id.* Baker’s supervisor testified that a computer failure would have shut down the entire machine and if the machine had “broken,” it would not have been possible to restart. *Id.*

151. *Id.* at 1142.

152. *Id.*

153. *Id.* at 1142-43.

placement or its lack of a guard rendered [the machine] unreasonably dangerous."¹⁵⁴ The court then pointed to additional issues of material fact in the designated evidentiary materials. Among the additional evidence was the testimony of Heye-America's vice president and general manager, who explained that the maintenance stop button could be placed in other places.¹⁵⁵ The director of machine development for Baker's employer also testified that he did not know if it would be feasible to locate the button higher up on the machine and that, in any event, he left it to Heye-America to design the machine from his basic instruction.¹⁵⁶

With regard to the placement of a guard over the button, both Baker and his supervisor testified that there originally was a guard on the maintenance stop button but that it had become loose and was not covering the button, thus allowing inadvertent activation.¹⁵⁷ Although representatives of Heye-America and Ball Foster (Baker's employer) acknowledged that guards were available for the buttons, they appeared to disagree about which entity was responsible for the lack of a guard.¹⁵⁸ Regardless, evidence was elicited that "there are advantages to both having a guard and opting not to have one, because a guard might make the button less accessible when it needed to be activated in an emergency."¹⁵⁹

In light of the conflicting evidence, the court concluded as follows:

In summary, the evidence shows that the maintenance stop button could have been located in a different place. . . . However, it also demonstrates significant disagreement among the witnesses with regard to whether Ball Foster or Heye-America determined the location of the button and whether it would have a guard. The witnesses also provided contradictory evidence about whether the lack of a guard rendered the machine unreasonably dangerous. . . . These genuine issues of material fact preclude summary judgment on these theories.¹⁶⁰

Two of the jury questions related directly to causation. Indeed, whether Baker activated the maintenance stop button is a cause-in-fact question. The second question—which company was responsible for the location of the button and the existence of a guard—simply endeavors to impose liability on the proper defendant. The two remaining questions are more substantive in terms of operative product liability IPLA theories: (1) whether placement of the maintenance stop button was a design defect that rendered the machine unreasonably dangerous and (2) whether the lack of a guard was a design defect that rendered the machine unreasonably dangerous.

One other aspect of the first part of the court's decision bears further

154. *Id.* at 1143.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1143-44.

discussion. The court pointed out in its summarizing paragraph that there was evidence to the effect that “the maintenance stop button *could have been* located in a different place.”¹⁶¹ Although the opinion does not discuss the point, practitioners should be aware that such evidence, by itself, does not and cannot establish the basis for a jury question on the issue of design defect. A product liability claimant in Indiana must come forward with evidence establishing a safer, feasible alternative design that would have reduced the risk of injury.¹⁶² In doing so, claimants must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹⁶³ Judge Easterbrook’s gauge for “feasibility” examines whether a manufacturer “fail[ed] to take precautions that are less expensive than the net costs of [the] accident.”¹⁶⁴

Applied to the situation in *Baker*, the fact that the maintenance stop button *could have been* located in a different place is only part of the equation. *Baker* must also establish that the alternative design could have prevented the injury and was effective, safer, more practicable, and more cost-effective than the one used. Similarly, the fact that the machine could have been designed with a guard over the button is not, by itself, sufficient to demonstrate an unreasonably dangerous design defect. Again, *Baker* must establish that an alternative design employing a guard could have prevented the injury and was effective, safer, more practicable, and more cost-effective than a design that did not incorporate a guard.

As noted above, in light of Indiana’s *Jarboe* summary judgment standard, the manufacturer must designate evidence to affirmatively demonstrate that the plaintiffs’ alternative proposed design, as a matter of law, could not have prevented the injury, and was ineffective, not safer, less practicable, and less cost-effective than the one used.¹⁶⁵ In *Baker*, summary judgment does not appear warranted on this point based upon the evidence discussed in the opinion because such evidence did not affirmatively establish entitlement to summary judgment on each of those points.¹⁶⁶

161. *Id.* at 1143.

162. *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

163. *Whitted*, 58 F.3d at 1206; *Burt*, 212 F. Supp. 2d at 900.

164. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

165. Summary judgment may be difficult to obtain if plaintiffs are able to designate contrary evidence, likely from opinion witnesses, that the “feasibility” of the alternative design is disputed and should be resolved by the jury unless the court finds that, as a matter of law, no reasonable jurors could disagree with the defendants’ position.

166. The only evidence discussed in the opinion relative to the feasibility of the location of the stop button was the testimony of Ball Foster’s director of machine development, who said that “he did not know if it would be feasible to locate the button higher up on the machine.” 799 N.E.2d at 1143. Such equivocation is insufficient to satisfy a movant’s summary judgment burden in Indiana.

With respect to the feasibility of designing the machine without a guard over the maintenance

The Bakers next contended that the machine was defective because it did not have a device that would enable one trapped in Baker's position (between the blank and the stacked wind appliance) to escape.¹⁶⁷ It was uncontroverted that no such release mechanism existed. The evidence demonstrated that "activation of the maintenance stop button caused the machine to open, and there is no button that would cause the machine to close."¹⁶⁸ The evidence also demonstrated that after Baker became trapped, he was unable to restart the machine because it had a two button start mechanism and no release mechanism inside the machine.¹⁶⁹ Heye-America's vice president and general manager testified that Baker's accident, in which his right hand was trapped on the left side of the machine, was a "very peculiar accident" that would not have been anticipated.¹⁷⁰ He also "opined that the more common safety concern would be providing a mechanism for freeing a worker's hand that was trapped in the closed, not the open, mold."¹⁷¹

The specific jury question that seems to remain in light of the foregoing evidence is whether the circumstances of Baker's injury presented a sufficient risk of injury so as to require a reasonable manufacturer to design the machine in the suggested alternative fashion. The manufacturer's designated evidence (at least that which is discussed in the opinion) challenged whether the circumstances of Baker's injury presented a sufficient risk of harm so as to require a design incorporating the kind of escape mechanism suggested by Baker and his expert. As was the case with the maintenance stop button, there was no discussion about the feasibility of the proposed alternative design or any of the points required to demonstrate a feasible alternative design.

Finally, the Bakers argued that the machine was defective because it did not include a gauge by which an operator could obtain wind measurements and adjust settings "in a way that did not require the operator to place his hand into the moving machinery components."¹⁷² In a related argument, the Bakers contended that the machine was defective because it "permitted a pinch point to be created between the machine and the blank when the blank was in [the] open position."¹⁷³

Baker's affidavit testimony stated that "to adjust the velocity of the wind injected onto the blank, the operator had to place his or her hand into the machine

stop button, the only evidence in the opinion was the testimony of Ball Foster's director of machine development, who explained "that there are advantages to both having a guard and opting not to have one, because a guard might make the button less accessible when it needed to be activated in an emergency." *Id.* at 1143. Such evidence would seem to carry a moving party's summary judgment burden with respect to "feasibility" only in the absence of any contrary evidence.

167. *Id.* at 1144.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

to measure the force of the wind.”¹⁷⁴ When in the open position, however, the blank was “so close to the stacked wind appliance that it created an unguarded pinch point.”¹⁷⁵ According to Heye-America, it does not “build machines that require the operator to stick his . . . hand inside.”¹⁷⁶ Rather, its machines utilize a portable magnahelic gauge that measures air pressure.¹⁷⁷ Moreover, according to Heye-America, there is no way to attach a permanent magnahelic gauge to a machine.¹⁷⁸

Designated evidence also revealed that operators historically checked wind speed with their hands, although current practice required them to use a portable gauge and not their hands.¹⁷⁹ A portable gauge was available to Baker to check the wind on the machine at issue.¹⁸⁰ Though workers were required to use a portable gauge, there was evidence that plant personnel knew operators often checked the wind with their hands.¹⁸¹ Indeed, several of Baker’s co-workers testified that this was the only way to check the wind on the blank side of the machine at issue and that a portable gauge would not have worked under the circumstances.¹⁸² Contrary to the co-workers’ testimony, however, one of the experts opined that a portable gauge could have been used to check the wind under the circumstances and that checking the wind with one’s hand is dangerous.¹⁸³ Baker himself testified that he used a portable gauge to check the wind on the front side of the machine, but was never trained on how to use a gauge to check the wind on the output side of the machine.¹⁸⁴

The court held that the designated evidence

show[ed] a genuine issue of material fact with regard to whether a magnahelic gauge could have been used to measure the wind flow in the problem area of [the machine at issue] and whether Heye-America knew or reasonably should have known that the machine operators customarily

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1144-45.

179. *Id.* at 1145.

180. *Id.*

181. *Id.*

182. *Id.* Co-workers also testified that other workers had previously caught their hands in the machines. *Id.* With respect to the feasibility of designing the machine without a guard over the maintenance stop button, the only evidence in the opinion was the testimony of Ball Foster’s director of machine development, who explained “that there are advantages to both having a guard and opting not to have one, because a guard might make the button less accessible when it needed to be activated in an emergency.” *Id.* at 1143. Such evidence would seem to carry a moving party’s summary judgment burden with respect to “feasibility” only in the absence of any contrary evidence.

183. *Id.* at 1145.

184. *Id.*

placed their hands inside the machine to gauge the wind.¹⁸⁵

The court's opinion nicely summarizes all of the disputed evidence and surmises from all the disputed evidence that fact questions preclude entry of summary judgment. Those determinations appear justified based upon the evidence set forth in the opinion. Operating within the specific framework of the IPLA, the threshold questions under these facts are whether operation of the machine without a portable gauge is (1) a use that is reasonably expectable and (2) not unreasonably dangerous. On these points, there is conflicting evidence, particularly with regard to the ability to use a portable gauge to properly test wind speed on the blank side of the machine at issue. It is also possible that another question is implicated, namely whether it was safer and still, in fact, feasible for a permanent or a different portable gauge to be used to measure wind speed on the blank side in such a way as to eliminate the need for an operator to place his hand into moving machinery.¹⁸⁶

Another important design defect case published during the survey period is *Lytle v. Ford Motor Co.*¹⁸⁷ There, the Indiana Court of Appeals held, among other things, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not scientifically reliable.¹⁸⁸ The court also held that the designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous.¹⁸⁹

Lytle, his wife, and his daughter were involved in a rollover accident while riding in a 1987 Ford Ranger pickup.¹⁹⁰ Although Lytle contended that his wife was wearing her seatbelt at the time of the accident, his wife was thrown from the truck and suffered permanent brain damage.¹⁹¹ Lytle contended in his complaint that Ford's defectively designed seat belts caused his wife's enhanced injuries.¹⁹² Lytle originally offered two specific design defect theories: first, that the seat belt buckle inertially released because of acceleration forces that occurred during the accident, and, alternatively, that improper placement of the seat belt buckles combined with the ease of release caused it to inadvertently release.¹⁹³ After Ford moved to exclude evidence of any design defects other than those relating

185. *Id.*

186. In connection with the feasibility analysis, it is important to recognize that the manufacturer designated evidence that it was impossible to add a permanent gauge to the machine at issue. No contrary evidence was identified in the opinion. On the record as it appears in the opinion, it would appear as though the manufacturer would be entitled to summary judgment on the narrow issue of whether attaching a permanent gauge may be used to support a design defect theory.

187. 814 N.E.2d 301 (Ind. Ct. App. 2004).

188. *Id.* at 302.

189. *Id.*

190. *Id.* at 304.

191. *Id.*

192. *Id.*

193. *Id.* at 305.

to inadvertent release, inertial release, or defects in the passenger door, Lytle's attorney informed the court that Lytle's only design "issue" was the selection of the buckle at issue compared to other safer alternative designs.¹⁹⁴ As such, the trial court granted Ford's motion, "concluding that the only issues remaining concerned the buckle's design and selection and Ford's failure to properly test the buckle."¹⁹⁵

The trial court also excluded testimony offered by Lytle's opinion witnesses with respect to inertial and inadvertent release, finding that the testimony was not scientifically reliable and would not assist the trier of fact.¹⁹⁶ Without those two witnesses, the trial court granted summary judgment to Ford because Lytle was unable to establish a genuine issue of material fact regarding design defect and causation.¹⁹⁷ In doing so, the court concluded that Lytle had abandoned his claim for inadvertent release.¹⁹⁸ The Indiana Court of Appeals reversed the trial court's initial grant of summary judgment, holding, among other things, that the trial court erred in determining that Lytle had abandoned his theory of inadvertent release.¹⁹⁹

Following the first appeal, Ford sought another summary judgment and to exclude the expert testimony of Lytle's inadvertent release opinion witnesses.²⁰⁰ The trial court excluded several of Lytle's exhibits and affidavits and, again,

194. *Id.*

195. *Id.*

196. *Id.* One of Lytle's opinion witnesses was Billy Peterson, who offered testimony about inertial release. *Id.* The trial court concluded that Peterson "could not show that the forces and circumstances which were present during his pendulum tests and which permitted the seat belts to inertially release, were sufficiently similar to the forces and circumstances which are present in a 'real world' accident, or which were present during the Lytle's [sic] accident." *Id.* Lytle's other opinion witness, John Marcosky, offered testimony about both inadvertent and inertial release. *Id.* The trial court excluded Marcosky's testimony as well. *Id.*

197. *Id.* at 306.

198. *Id.*

199. *Id.*

200. *Id.* Lytle's opinion witnesses were Billy Peterson (the same witness whose testimony about inertial release was excluded) and Thomas Horton. Peterson subsequently died and was replaced as an opinion witness by Dr. Anil Khadikar. *Id.* Ford argued that testimony from its own opinion witnesses established that the seatbelt assemblies were not defectively designed and that Lytle failed to present any contrary evidence. *Id.* Ford also argued that it was entitled to summary judgment on the issue of negligence and design defect because the testimony of Lytle's opinion witnesses was inadmissible and scientifically unreliable. *Id.* Even if Lytle's opinion testimony could be admitted, Ford nevertheless contended that it was entitled to summary judgment because "Lytle failed to put forth any evidence demonstrating that the seatbelt assemblies were defective or that feasible, safer and more practical designs were available and would have afforded better protection." *Id.* Finally, Ford asserted that Lytle's designated evidence failed to establish alternative designs that could have prevented the injury and that the injuries alleged were proximately caused by the seatbelt assemblies. *Id.*

entered summary judgment for Ford.²⁰¹ In so determining, the trial court found that the seatbelt was in fact latched and in the proper position and that the causal link between the design defect and the injury alleged also had to be established by scientific evidence.²⁰² The trial court also noted that neither of Lytle's inadvertent release opinion witnesses performed any testing and that "there was no credible expert testimony that was based on reliable scientific principles that their theory could work in the real world and was what, in fact, occurred in Lytle's vehicle."²⁰³ With respect to the theory of inadvertent unlatch, the trial court observed that "there are no reported publications, no reported experiments or testing demonstrating that inadvertent unlatch as claimed by Lytle occurs in the real world."²⁰⁴

After an excellent discussion about the gatekeeping function performed by Indiana courts under Rule 702 of the Indiana Rules of Evidence,²⁰⁵ the *Lytle* court affirmed the exclusion of both of Lytle's inadvertent release opinion witnesses. With respect to the first witness, Thomas Horton,²⁰⁶ the court wrote as follows:

[I]t is apparent from the record that Horton simply twisted and pushed two seatbelts together without any evidence that the accident could have resulted in the same forces, direction, duration, rotations, or load conditions as his manipulations. Ford says—and we agree—that proof of "inadvertent unlatch" should require a specific scientific analysis, the same as we required with regard to the theory of "inertial release." . . . [W]e agree with the trial court's conclusion that Horton's testimony also had to be excluded. In our view, the *possibility* that an inadvertent unlatch occurred in this accident depends on a similar convergence of all of the variables addressed above: a particular direction of movement and rotation of the belt assemblies, coupled with the proper force and webbing load, all for the appropriate duration. Put another way, given the evidence in this record, we cannot see how the convergence of all

201. *Id.* at 306-07.

202. *Id.*

203. *Id.*

204. *Id.*

On the other hand, the trial court concluded that Ford's witnesses documented their testing, demonstrated that their theories, tests, and techniques can be repeated and replicated, that findings have been published with regard to this case, and that the methodology that they followed is well-accepted in the technical and scientific community concerned with automobile safety issues.

Id.

205. IND. EVID. R. 702.

206. Horton's testing procedures involved replacing "the buckles with end release buckles and confirm[ing] that, with those types of buckles, any contact would not involve contact with the pushbutton of the outboard passenger's end release buckle." *Lytle*, 814 N.E.2d at 310-11. Accordingly, Horton maintained that "the design defect and alternatives in this case are proved not by testing, but from skilled observation, common sense, knowledge and experience." *Id.*

these variables at a precise moment in time can simply be “observed.” . . . [I]t is apparent that Lytle’s experts have concluded that the seatbelt was defective based only on their hypotheses as to what might have occurred during the accident. [W]e must conclude that Horton’s purported expert testimony failed to comply with Indiana Evidence Rule 702(b), inasmuch as Lytle failed to show that his opinions were based upon reliable scientific principles.²⁰⁷

The court came to the same basic conclusions with regard to Lytle’s second inadvertent release opinion witness, Dr. Anil Khadilkar:

As with Horton, the record shows that Dr. Khadilkar’s testimony regarding inadvertent unlatch was based primarily on observation and analysis of geometry of the restraint system and its alternatives. . . . As with Horton’s testimony, Lytle fails to show that Dr. Khadilkar satisfied the reliability test with regard to his testimony. That is, Dr. Khadilkar never documented the amount of depression that was necessary to release the seatbelt buckle in the accident. Additionally, even though Dr. Khadilkar authored an affidavit and two expert reports, he never identified a reliable basis for his conclusion. It is also noteworthy that Dr. Khadilkar did not perform any research, and he did not identify any literature in support of his theory. . . . The record before us shows that Dr. Khadilkar engaged in less than ten minutes of “testing” to reach his opinion: he placed a buckle against a table in his office and “eyeballed” the depression necessary to release the latchplate. . . . The record is devoid of any indication that Dr. Khadilkar made an effort to measure the force, web tension, direction or rotation that would occur in this type of accident. Moreover, Dr. Khadilkar did not favor the trial court with any other evidence establishing that the seatbelt assemblies moved toward one another, moved with any particular force or load, twisted into position, or that any other object contacted the passenger’s button at all, let alone with sufficient force, direction, duration, rotation, and load conditions to release the buckle. As with Horton’s testimony, we are compelled to conclude that the trial court properly excluded Dr. Khadilkar’s testimony.²⁰⁸

Lytle next argued that scientific testimony is not necessarily required to

207. *Id.* at 311-12. The court noted that there were certain aspects of Horton’s testimony that were susceptible to mere observation, including “(1) the fact that two seat belt buckles are in close proximity to each other; (2) the relative length and position of the buckle stalks; and (3) the fact that some release buttons are more difficult to depress than others.” *Id.* at 312. The court nevertheless excluded the testimony, concluding that such “circumstances indicate that a layperson is just as capable of evaluating the evidence and reaching the conclusions that Horton did on these points. Hence, we reject the notion that Horton could rely upon general principles of physics alone to establish the necessary conclusions to defeat summary judgment.” *Id.* at 312-13.

208. *Id.* at 314.

prove causation. Thus, Lytle argued that the court should not have granted summary judgment because Horton and Dr. Khadilkar's testimony established, at the very least, that other alternatives existed and that it was not a good engineering practice for Ford to have placed a vehicle into commerce with its belt buckles immediately adjacent to one another, allowing for contact and inadvertent release.²⁰⁹ The court rejected Lytle's argument, holding that "the trial court accurately applied the established principles when analyzing the proposed expert testimony regarding a nexus between the data and the accident."²¹⁰ "In short," the court wrote, "the trial court properly required Lytle to demonstrate the reliability of his proposed expert testimony," which he failed to do.²¹¹

Following a discussion about exclusion of exhibits, the Lytle court's final issue concerned whether the trial court properly weighed the designated evidence in granting summary judgment to Ford. Lytle argued, alternatively, "that the trial court erred in relying upon Ford's crash testing[,] . . . that it erroneously concluded that [Ford's] testing disproved [his] experts' theory of defect, and that the evidence did not support the trial court's conclusion that [his] theory could not be replicated."²¹²

The court rejected Lytle's arguments, recognizing that Ford introduced evidence establishing that the seatbelt assembly was not defective or unreasonably dangerous, thus shifting the burden to Lytle. Indeed, "Ford introduced both laboratory and dynamic crash test evidence that accidents exhibiting the crash characteristics alleged by Lytle do not cause contact between the center seatbelt assembly and the passenger latch plate with the forces, direction, duration, rotations, and load conditions necessary to cause unlatching."²¹³ The court continued:

The crash tests that Ford performed demonstrated that the Lytle impact could not have provided sufficient force, and could not have twisted the middle seatbelt buckle sufficiently, with the correct direction, rotation, and force to trigger an accidental release. Ford also introduced evidence that its experts have tested belts under roll conditions and believed that if the belt had inadvertently unlatched, it likely would have become entangled with [the passenger's] arm when she was ejected resulting in marks on the webbing and bruising on her right arm, neither of which occurred.²¹⁴

The court also pointed out that Ford's dynamic and rollover tests were performed

209. *Id.* at 315.

210. *Id.*

211. *Id.*

212. *Id.* at 317. Lytle argued that Ford presented two crash tests with a stationary Ford Ranger that did not roll and that contained dummies sitting upright that were not certified for side impact or rollover testing. *Id.* Accordingly, Lytle maintained that the tests Ford conducted in no way disproved his theory of the case. *Id.*

213. *Id.* at 317-18.

214. *Id.* at 318.

“in substantially similar circumstances to simulate the moment of impact and the roll sequence.”²¹⁵ In addition, Ford “introduced physical evidence that [the seat belt at issue] was in a stowed position at the time of the alleged inadvertent unlatching.”²¹⁶ Accordingly, the court had no problem concluding that Ford presented sufficient evidence to establish grounds for summary judgment and that Lytle failed to present admissible evidence on his required elements of proof to counter Ford’s evidence once the burden had shifted to him.²¹⁷

It is worthy of note that Ford appears to have taken great care to produce evidence necessary to affirmatively carry its summary judgment burden with respect to the claimant’s design defect allegations. The *Lytle* opinion provides excellent guidance for product liability practitioners in terms of Rule 702 admissibility and summary judgment practice. *Lytle* is before the Indiana Supreme Court pending a transfer decision.

City of Gary v. Smith & Wesson Corp.,²¹⁸ a case decided at the outset of the survey period, is noteworthy here because it involved alleged design defects in the unusual context of a public nuisance claim. The City of Gary and its mayor sued several handgun manufacturers, distributors, and retailers, alleging, among other claims, negligent design, manufacture, distribution, and sale of guns with inadequate, incomplete, or nonexistent warnings regarding the risks of harm. The City alleged a separate design defect claim against the manufacturers for failure to include adequate safety devices. The Indiana Court of Appeals rejected all such bases of liability, holding that no duty of care existed between the parties because the attenuated relationship between the City and the defendants rendered the connection between the harm alleged by the City and the conduct of the defendants tenuous and remote.²¹⁹ The court concluded that the City simply was not a reasonably foreseeable plaintiff injured in a reasonably foreseeable manner.²²⁰

The Indiana Supreme Court reversed, first concluding that the City’s allegations were sufficient to give rise to public nuisance and general negligence claims.²²¹ The *City of Gary* court also reversed with respect to the City’s negligent design claim against the manufacturers.²²² The City contended that the manufacturers

were negligent in designing the handguns in a manner such that the defendants foresaw or should have foreseen that the products would pose unreasonable risks of harm to the citizens of Gary who were unaware of

215. *Id.*

216. *Id.*

217. *Id.* at 319.

218. 801 N.E.2d 1222 (Ind. 2003).

219. *City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002), *rev’d*, 801 N.E.2d 1222 (Ind. 2003).

220. 776 N.E.2d at 388.

221. 801 N.E.2d at 1229-47.

222. *Id.* at 1248-49.

the dangers of a firearm or untrained in the use of handguns, or who are minors or mentally impaired persons.²²³

The City further alleged that the handguns were defective because they lacked:

adequate safety devices including, but not limited to, devices that prevent handguns from being fired by unauthorized users, devices increasing the amount of pressure necessary to activate the trigger, devices alerting the users that a round was in the chamber, devices that prevent the firearm from firing when the magazine is removed, and devices to inhibit unlawful use by prohibited or unauthorized users.²²⁴

Although the *City of Gary* court recognized that the City is not a purchaser and has no direct claim under “statutory or common law theories,” the court nonetheless concluded as follows:

[T]o the extent these actions constitute an unreasonable interference with a public right, the City has alleged a claim for a public nuisance. Whether these alleged design defects are unreasonable and the extent to which they contribute to the harm alleged are matters for trial. Similarly, the availability of relief appropriate to any unreasonable interference, given that the defendant’s products are lawful and the public has a right to acquire them may present substantial obstacles to the City’s claim.²²⁵

The court, therefore, held that at the pleadings stage, “the City has stated a claim for relief.”²²⁶

E. “. . . regardless of the substantive legal theory. . . .”

Indiana Code section 34-20-1-1 provides that the IPLA “governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for a physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought.*”²²⁷ Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA’s statutory definitions are not governed by the IPLA.²²⁸ At the same time, however, Indiana Code section 34-20-1-2 provides that the “[IPLA] shall not be construed to limit

223. *Id.* at 1247.

224. *Id.* The City also alleged that the manufacturers “knowingly and intentionally colluded with each other to adhere to unsafe industry customs regarding the design of handguns.” *Id.*

225. *Id.* at 1248.

226. *Id.*

227. IND. CODE § 34-20-1-1 (2004) (emphasis added).

228. *E.g.*, *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (finding that a claim alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability and, thus, plaintiff could proceed on a warranty theory so long as it was limited to a contract theory).

any other action from being brought against a seller of a product.” That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-2 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover.

In recent years, both federal and Indiana appellate courts have addressed the issue. During the 2004 survey period, the Indiana Supreme Court examined the issue in the case of *Kennedy v. Guess, Inc.*²²⁹ In that case, recall that one of the plaintiffs was struck in the nose by an allegedly defective umbrella that plaintiffs received as a free gift along with the purchase of a “Guess” watch. Recall also that Guess licensed rights to Callanen to market products bearing the “Guess” logo, including the watch and the umbrella at issue.²³⁰ The Kennedys asserted both “strict liability” and “negligence” theories of recovery.

The *Kennedy* court first addressed what it called the “strict liability” claim in the context of Indiana Code sections 34-20-2-3 and -2-4, ultimately determining under the latter statute that Callanen was not entitled to summary judgment because a fact question existed regarding whether it was the principal distributor or seller of the umbrella, thus allowing it to be considered a statutory “manufacturer.”²³¹ Guess, however, was entitled to summary judgment because it could not be considered the principal distributor or seller of the umbrella and, therefore, not a statutory “manufacturer.”²³²

The second issue the *Kennedy* court considered was whether Guess or Callanen owed plaintiffs a duty under section 400 of the Restatement (Second) of Torts²³³ as “apparent manufacturers” of the umbrella. Like Indiana Code section 34-20-2-4, section 400 allows sellers to be treated as manufacturers for purposes of imposing tort liability. The circumstances under which such treatment is sanctioned are vastly different, however, because section 400 subjects sellers to the same liability as manufacturers merely because the seller “puts out as his own product a chattel manufactured by another.”²³⁴ Long before the current IPLA was enacted, the Indiana Court of Appeals employed section 400 in *Dudley Sports Co. v. Schmitt*,²³⁵ to hold a vendor liable for the negligence of a manufacturer where the vendor placed its name on a product and gave no indication of who was the actual manufacturer.

The *Kennedy* court concluded that Callanen could not be deemed an “apparent manufacturer” because it did not design, manufacture, assemble, or test the umbrella, and because “there is nothing to suggest that the Kennedys were

229. 806 N.E.2d 776 (Ind. 2004).

230. *Id.* at 779.

231. *Id.* at 783.

232. *Id.*

233. RESTATEMENT (SECOND) OF TORTS § 400 (1965).

234. *Kennedy*, 806 N.E.2d at 784.

235. 279 N.E.2d 266 (Ind. Ct. App. 1972).

induced to believe that Callanen was the manufacturer of the umbrella in question.”²³⁶ That Guess permitted Callanen to use the Guess name was, by itself, insufficient to hold Callanen liable as an “apparent manufacturer.”²³⁷

The result with regard to Guess was different. Although Guess did not play any role as seller, manufacturer, or distributor, it did exercise “some control over the product itself (like approving placement of the logo).”²³⁸ In announcing its rule of liability with regard to trademark licensors under section 400, the court concluded as follows:

Indiana common law should treat trademark licensors as having responsibility for defective products placed in the stream of commerce bearing their marks, but only so much of the liability for those defects as their relative role in the large scheme of design, advertising, manufacturing, and distribution warrants. Consumers rightly expect that products bearing logos like “Guess” have been subject to some oversight by those who put their name on the product, but those same consumers can well imagine that in modern commerce the products they buy may have actually been manufactured by someone else. . . . Summary judgment for Guess on the negligence claim was inappropriate.”²³⁹

A panel of the Indiana Court of Appeals sanctioned a similar occurrence in *Coffman v. PSI Energy, Inc.*,²⁴⁰ when it allowed a negligence claim to proceed under section 392 of the Restatement (Second) of Torts²⁴¹ for physical injuries allegedly caused by a defective and unreasonably dangerous mechanical trailer cover system against an entity that was undisputedly neither a “manufacturer” or “seller” under the IPLA. In that case, discussed below more fully in connection with the “incurred risk” defense, a truck driver suffered electrical burns when the metal mechanical trailer cover frame contacted an overhead power line as he raised the frame over a trash-filled trailer.²⁴² Among the entities the driver and his wife sued were Rumpke of Indiana, LLC, the company that leased the truck’s services for purposes of the particular job on which the accident occurred; Refuse Handling Services, Inc., the owner of the trash distribution facility at which the

236. 806 N.E.2d at 784.

237. *Id.* “Guess” was the only name appearing on the umbrella. *Id.* As the court concluded: Any involvement Callanen had with the umbrella occurred after it was designed and manufactured. While Callanen did purchase the umbrellas for distribution, it received the umbrellas already packaged for distribution from Interasia. . . . Generally, Callanen did not even open the packaging unless it was going to send less than ten umbrellas to a particular store. . . . [The Kennedys] have failed to carry their burden. The trial court was correct to grant Callanen summary judgment on the negligence claim.

Id. at 785.

238. *Id.* at 786.

239. *Id.*

240. 815 N.E.2d 522 (Ind. Ct. App. 2004).

241. RESTATEMENT (SECOND) OF TORTS § 392 (1965).

242. *Id.* at 525.

accident occurred; and Mountain Tarp, Inc., the designer, manufacturer, and installer of the trailer cover.²⁴³

The *Coffman* court pointed out that Rumpke's attorneys addressed the Coffmans' allegation concerning Rumpke's failure to warn claim as if it were intended to state a claim against Rumpke under the IPLA.²⁴⁴ "However," according to the court,

the Coffmans seek relief from Rumpke only under common law negligence theories [T]he Coffmans argued that there are material issues of fact as to whether Rumpke, acting as a supplier of "chattel dangerous for intended use" under Section 392 of the Restatement (Second) of Torts, and acting as Carl's contract employer, failed to exercise reasonable care.²⁴⁵

Although the court ultimately concluded that Rumpke could bear no liability because Coffman incurred the risk of his injuries as a matter of law, the court clearly appears to have allowed the matter to proceed outside the IPLA.²⁴⁶ The court did so even though the "physical harm" alleged clearly involved physical injuries caused by the allegedly defective and unreasonably dangerous trailer cover. In addition, the court sanctioned the common law negligence claim despite the fact that the allegation against Rumpke involved a failure to warn theory and that Rumpke was undisputedly neither a manufacturer or a seller within the purview of the IPLA.²⁴⁷

Like *Kennedy* and *Coffman*, two recent federal cases, *Ritchie v. Glidden Co.*,²⁴⁸ and *Goines v. Federal Express Corp.*,²⁴⁹ also subjected "sellers" to potential liability based on common law negligence theories for the very same "physical harm" covered by the IPLA. In doing so, those courts assumed that common law "negligence" claims based upon design and warning theories exist separate and apart from the IPLA, citing to cases that were decided before the 1995 amendments to the IPLA and at a time when Indiana still recognized dual-track strict liability and negligence claims.

All four of the foregoing cases allowed common law negligence claims to proceed outside the IPLA. Such is true despite the fact that the cases clearly involved "physical harm" as the IPLA defines the term and defendants that were not "manufacturers" or "sellers" under the IPLA. As noted above, there are important policy considerations involved when courts decide to impose common law negligence liability in cases involving "physical harm" as defined by the IPLA against entities who do not otherwise qualify as "manufacturers" or

243. *Id.* at 524-25.

244. *Id.* at 524 n.1.

245. *Id.*

246. *Id.*

247. *Id.*

248. 242 F.3d 713 (7th Cir. 2001).

249. No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, (S.D. Ill. Jan. 8, 2002) (applying Indiana law).

“sellers” under the IPLA.

The Indiana General Assembly has, through the IPLA, made the policy determination that “sellers” and “manufacturers” may not be held liable for “physical harm” unless the statutory predicates set forth in the Indiana Code have been established.²⁵⁰ The General Assembly has, also through the IPLA, made the important policy determination that the IPLA governs *all* actions against a manufacturer or seller for *physical harm* caused by a product “*regardless of the substantive legal theory or theories upon which the action is brought.*”²⁵¹ It is difficult, therefore, to contemplate that the General Assembly intended a result by which a manufacturer or seller that is not liable under the IPLA for the “physical harm” allegedly caused by a defective product is nevertheless liable under the common law for that same “physical harm” when the IPLA is intended to cover *all* actions against manufacturers and sellers for “physical harm.”²⁵²

In the wake of *Kennedy, Coffman, Ritchie, and Goines*, judges, practitioners, and perhaps even the Indiana General Assembly must take a hard look at whether and to what extent common law negligence claims for the same “physical harm” covered by the IPLA are “other action[s]” that the IPLA does not limit.²⁵³

II. DEFENSES

A. Use With Knowledge of Danger (Incurred Risk)

Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.”²⁵⁴ Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.”²⁵⁵ At least one Indiana court has held in the summary

250. “Sellers,” for example, may be liable under the IPLA only if the entity at issue meets the statutory definitions set forth in Indiana Code section 34-6-2-77(a) or Indiana Code section 34-20-2-4.

251. IND. CODE § 34-20-1-1 (2004) (emphasis added).

252. *Id.* § 34-20-1-1 (emphasis added).

253. Indiana Code section 34-20-1-2 provides that the IPLA “shall not be construed to limit any other action from being brought against a seller of a product.” *Id.* § 34-20-1-2. Both the placement of that provision and the words chosen are important. Having specifically stated in Indiana Code section 34-20-1-1 that the IPLA governs *all* actions against a seller or a manufacturer for physical harm caused by a product regardless of the substantive theory or theories upon which the action is brought, it would seem to logically follow that the only “other action” to which the General Assembly later refers are those alleging some type of non-physical (i.e., commercial) harm. Such harm may be redressed as a matter of contract or warranty in a separate action not intended to be affected by the IPLA’s coverage of “physical harm.”

254. *Id.* § 34-20-6-3.

255. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999).

judgment context that application of the incurred risk defense requires evidence without conflict from which the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.²⁵⁶

The court of appeals decided an incurred risk case during the Survey period. In *Coffman v. PSI Energy, Inc.*,²⁵⁷ plaintiff Carl Coffman was a truck driver for Buchta Trucking. Coffman had driven various types of trucks since 1981, and had experience driving haulers with tarp-covered dump trailers.²⁵⁸ During the summer of 1999, Rumpke of Indiana began subleasing Buchta trucks and drivers, including Coffman.²⁵⁹ On November 16, 1999, Coffman went to a facility operated by Mountain Tarp, Inc. to pick up a forty-eight foot trailer Rumpke had purchased.²⁶⁰ The trailer had a mechanical tarpaulin trailer cover system that Mountain Tarp designed, manufactured, and installed.²⁶¹ A warning near the crank mechanism and adjacent to the tarp brake handle that was used to operate the tarpaulin stated in large red letters on a white background, "DANGER Watch for Electrical Lines Overhead."²⁶² Although the tarp system on the trailer at issue was designed to lift overhead and, therefore, unlike the side-to-side rolling tarps that Coffman had predominately used in the past, a representative from Mountain Tarp taught Coffman how to operate the mechanical tarp device.²⁶³ Coffman indicated that he understood the instructions.²⁶⁴

Coffman was dispatched to pick up a load of trash at a distribution facility near Greencastle operated by Refuse Handling Services, Inc.²⁶⁵ Because he had

256. Indiana courts have decided some important incurred risk cases in the last few years. *E.g.*, *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case since plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999) (finding because the plaintiffs did not adequately specify the basis of their claim, it was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers' injuries resulted leaving the court unable to determine the applicability of the incurred risk defense); *Cole*, 714 N.E.2d 194 (concluding that because plaintiff's job necessarily entailed moving containers across gap between aircraft and aircraft loading equipment and his apparent belief that he had to somehow find a way to work around the known danger posed by the gap, whether plaintiff voluntarily incurred the risk of falling through the gap is also a fact question for the jury's resolution).

257. 815 N.E.2d 522 (Ind. Ct. App. 2004).

258. *Id.* at 524.

259. *Id.*

260. *Id.*

261. *Id.* at 525.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

driven to and from that facility at least twenty-five times, Coffman was aware of the existence at the facility of overhead electrical power lines owned by PSI Energy, Inc. As Coffman raised the tarp over the trash-filled trailer, the metal tarp frame contacted the power lines, causing electricity to pass into the tractor trailer and resulting in serious burns to Coffman.²⁶⁶

Coffman and his wife sued PSI, Rumpke, Refuse Handling, Mountain Tarp, and Vectren Corp. The trial court entered summary judgment and, subsequently, final judgment for each of the defendants.²⁶⁷ The Coffmans appealed. The Indiana Court of Appeals first pointed out that all of their negligence claims “sound in products liability and the failure to warn,”²⁶⁸ though, as noted above, common law negligence (not the IPLA) appears to have been the basis the “failure to warn” claims against Rumpke.²⁶⁹ Next, the court recognized that “the doctrine of incurred risk will preclude recovery ‘if the evidence is without conflict and the sole inference to be drawn is that the plaintiff (a) had actual knowledge of the specific risk, and (b) understood and appreciated the risk.’”²⁷⁰

Applying the foregoing standard to the facts of the case before it, the court pointed out that Coffman’s deposition testimony revealed that he had driven to the Refuse Handling facility approximately twenty-five times before the accident, that Coffman knew that the overhead power lines were there, that he knew about the risk of contacting those overhead power lines when performing the tarping process, and that he wanted to avoid touching the lines during the process.²⁷¹ Although he knew that the lines were present, Coffman admitted that he simply “didn’t think about them” and acknowledged that had he “simply looked up after parking the trailer, in all likelihood he would have noticed that he was directly beneath the power lines that were overhead.”²⁷² In addition, the court recognized that there was no dispute that Coffman “could not have avoided seeing the warning label every time he looked at the handle that operated the tarp system.”²⁷³

In light of such evidence, the court wrote as follows:

266. *Id.*

267. *Id.* at 526. The theory against Refuse Handling was that Coffman was its business invitee at the time of the accident. *Id.* The theory against PSI (and Vectren) was that it negligently suspended the power line parallel to the facility’s graveled driving area and that it breached its duty to insulate, mark, or otherwise warn of the uninsulated power line. *Id.* at 525-26. The Coffmans dismissed Vectren well before the case was adjudicated. *Id.* at 525 n.3. The theory against Rumpke was that it failed to adequately warn Coffman of the danger of operating the tarp in proximity to power lines. *Id.* The theories against Mountain Tarp were that it improperly installed the tarp system and that it, like Rumpke, failed to warn of the danger of operating the tarp in proximity to power lines. *Id.*

268. *Id.* at 526.

269. *See Coffman*, 815 N.E.2d at 524 n.1 and text accompanying *supra* notes 242-48.

270. 815 N.E.2d at 527-28.

271. *Id.* at 528.

272. *Id.*

273. *Id.* at 529.

It is apparent to us that [Coffman] . . . was simply not paying attention, not looking and not thinking, despite his own knowledge concerning the overhead power lines. To be sure, the evidence established that [Coffman] understood the risk and had actual knowledge of the presence and location of the power lines. . . . [T]here was no unreasonable risk of harm that [the defendants] should have expected would not be discovered or realized by [Coffman] in these circumstances. Although [Coffman] had actual knowledge of the presence and location of the power lines on the day that the injury occurred, he unfortunately ignored the lines. . . .

While we are certainly sympathetic to the Coffmans' plight, it is apparent that the injuries [Coffman] sustained were brought about by his own negligence. . . . [A]s a matter of law, the alleged inadequacy of the warnings provided to [Coffman] could not have been a proximate cause of his injuries. . . . [H]e was fully aware of the risks of injury associated with his conduct, and he disregarded all warnings that were provided. Simply put, no warning could have prevented this accident because [Coffman] essentially paid no attention to what he was doing or where he was doing it. . . .

In our view, the evidence overwhelmingly demonstrates that [Coffman] incurred the risk of his injuries, such that his contributory negligence was more than the total of any alleged negligence on the part of the appellees.²⁷⁴

The *Coffman* court, therefore, held that the trial court properly entered summary judgment.²⁷⁵

Although the case was decided during last year's survey period, *Vaughn v. Daniels Co.*,²⁷⁶ bears mention here because it is an important incurred risk case and because it is pending a decision by the Indiana Supreme Court on whether to grant transfer. There, defendant Daniels Company designed a coal preparation plant. A contractor constructed the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications.²⁷⁷ Plaintiff Vaughn, an employee of the contractor, was injured while installing one of the coal sumps into the coal preparation plant.²⁷⁸ In an effort to aid his co-workers during installation, Vaughn climbed onto the sump without his safety belt while a pipe was maneuvered through the wall of the plant by a forklift and raised to the level of the sump.²⁷⁹ After raising the pipe, workers wrapped a chain around the pipe

274. *Id.*

275. 815 N.E.2d at 529.

276. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003).

277. *Id.* at 1116.

278. *Id.*

279. *Id.*

to support it as the forklift pulled away.²⁸⁰ The chain gave way, the pipe slipped, and Vaughn fell.²⁸¹

One of Daniels' arguments was that Vaughn knew and appreciated the risk of falling and failed to take proper precautions despite his knowledge.²⁸² It was undisputed that Vaughn understood and appreciated the risks of working at heights and the need for him to wear a safety belt.²⁸³ He was, in fact, wearing his belt until moments before the accident; but he did not put it back on before rushing to the sump to assist his co-worker.²⁸⁴ The trial court agreed, finding that Vaughn "knew and appreciated the risk of falling that came with not being properly [fastened] while working at heights and despite his knowledge and appreciation of this risk, failed to take proper safety precautions."²⁸⁵

Daniels countered that his failure to wear his safety belt was not voluntary under the circumstances because he was rushing to help his coworkers who needed assistance. Thus, Vaughn argued that "although he knew of the general risks of working at heights without wearing a safety belt, his failure to do so in this case was reasonable because of the need to help his coworkers."²⁸⁶ In addition, Vaughn pointed to his deposition testimony in which he stated that he had no place to fasten his safety belt while working on the sump at issue and that there had been a handrail around another sump he had previously installed onto which he could fasten the belt.²⁸⁷

Focusing on the phrase "actual knowledge of the specific risk" and taking its cue from *Ferguson v. Modern Farm Systems, Inc.*,²⁸⁸ the court reasoned as follows:

It is true that the undisputed designated evidence is that Vaughn understood the danger of working at heights over six feet without a safety belt and yet climbed to the top of the sump to install the pipe without wearing it or tying off. . . . That being said, however, there remains a question concerning the voluntariness of the failure to wear the belt given the urgent need of the coworkers for help. There is also the risk of working on the sump without a handrail as a result of the allegedly defective design. There remain questions as to whether Vaughn was fully aware that the sump had no handrail before he went up the ladder and that he fully understood the risk of being on the sump without a handrail such that he really could have voluntarily undertaken

280. *Id.*

281. *Id.*

282. *Id.* at 1132.

283. *Id.*

284. *Id.*

285. *Id.* at 1131.

286. *Id.* at 1132.

287. *Id.*

288. 555 N.E.2d 1379 (Ind. Ct. App. 1990).

the task of installing the pipe even in spite of the danger.²⁸⁹

Accordingly, the *Vaughn* court held that questions of fact exist “relating to whether Vaughn incurred the risk, and, therefore, summary judgment was inappropriate.”²⁹⁰

It is important to note here that, in discussing the incurred risk defense, the *Vaughn* court wrote that Indiana Code section 34-20-6-3 “provides a *complete defense* where a plaintiff incurs the risks associated with the use of a product.”²⁹¹ The use of the term “complete” is not insignificant. A “complete” defense in this context is one that, if the requirements to establish it are met, relieves a defendant of liability and automatically eliminates any need for fault allocation. Incurred risk, misuse, and alteration/modification were “complete” defenses to IPLA claims before the 1995 amendments.²⁹²

In addition to *Vaughn*, the court of appeals opinion in *Hopper v. Carey* determined that incurred risk remains a complete defense in Indiana.²⁹³ The opinion in *Coffman* is an interesting counter to *Vaughn* and *Hopper*. As noted above, the *Coffman* court seemed to believe that the incurred risk defense was not a complete one, and proceeded with a comparative fault analysis, ultimately finding no liability because, as a matter of law, no reasonable juror could have concluded anything other than that Coffman’s comparative fault in incurring the risk exceeded the total fault that could be assessed to the alleged tortfeasors.²⁹⁴

When the General Assembly amended in 1995 what is now Indiana Code section 34-20-6-3(3), it eliminated the word “unreasonably” from the phrase that previously read “nevertheless proceeded ‘unreasonably’ to make use of the product.” The language choice tends to support the proposition that incurred risk is not subject to fault apportionment. Perhaps more importantly, the definition of “fault” for cases governed by the Comparative Fault Act includes a plaintiff’s assumed or incurred risk, whereas the definition of “fault” for purposes of the

289. 777 N.E.2d at 1132.

290. *Id.*

291. *Id.* at 1130 (emphasis added).

292. *E.g.*, *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984) (misuse); *Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994) (modification/alteration); *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715 (Ind. Ct. App. 1995) (incurred risk).

293. 716 N.E.2d 566, 576 (Ind. Ct. App. 1999) (“[E]ven if a product is sold in a defective condition unreasonably dangerous, recovery *will be denied* an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily [incurred] the risk.”) (emphasis added) (citation omitted).

294. The court in *Coffman* noted that incurred risk bars a product strict liability claim when the evidence is undisputed and reasonable minds could draw only one inference. 815 N.E.2d at 528 (citing *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 402 (Ind. Ct. App. 1999)). “While the allocation of each party’s proportionate fault is generally a question for the trier of fact, in a negligence action, such is not the case when there is no dispute in the evidence and the trier of fact could reach only one conclusion.” *Id.* at 528.

IPLA does not.²⁹⁵ It follows, therefore, that an IPLA plaintiff's incurred risk, because it is not "fault" under the IPLA, should not be subject to fault apportionment.²⁹⁶

B. Misuse

Indiana Code section 34-20-6-4 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.²⁹⁷

Knowledge of a product's defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of "misuse" many times may be similar to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers under Indiana Code 34-20-4-1(1) or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable under Indiana Code section 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*,²⁹⁸ and *Burt v.*

295. Indiana Code section 34-6-2-45(b) defines "fault" for cases governed by the Comparative Fault Act and includes within that definition the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." IND. CODE § 34-6-2-45(b) (2004). Indiana Code section 34-6-2-45(a) defines "fault" for cases governed by the IPLA, and, although it tracks the definition in Section (b) closely, conspicuously eliminates any reference to assumption of risk and incurred risk. *Id.* § 34-6-2-45(a). "Fault" for purposes of the IPLA means:

- ... an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:
- (1) Unreasonable failure to avoid an injury or to mitigate damages.
 - (2) A finding under IC 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

Id.

296. On this point, Indiana Pattern Jury Instruction 7.05(b) further confuses the issue because it requires fault allocation even in the fact of a finding that a claimant incurred the risk. Practitioners and judges on occasion cite to *Kerr*, 719 N.E.2d at 402, to support a conclusion that incurred risk should be part of a comparative fault analysis. However, *Kerr* largely undercuts such a conclusion because the Indiana Court of Appeals in *Kerr* relied on *Heck v. Robey*, 659 N.E.2d 498, 505 nn.9&10 (Ind. 1995), a premises liability case that relied upon what is now Indiana Code section 34-51-2-6 for its conclusion. As noted above, there is a difference between the definition of fault under the Comparative Fault Act and the definition of fault under the IPLA, which does not include incurred risk.

297. IND. CODE § 34-20-6-4.

298. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the

Makita USA, Inc.,²⁹⁹ have resolved the applicability of the misuse defense as a matter of law, while others such as *Vaughn v. Daniels Co.*³⁰⁰ have reserved the applicability of the defense for the jury's consideration.³⁰¹

As is the case with the incurred risk defense, courts applying Indiana law continue to reach contrary decisions with regard to whether misuse is a complete

manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car. Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026. For example, the decedent failed to block the tires while he used the jack; he used the jack when the vehicle was not on a flat surface; and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030. The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could have found that [the decedent] was less than 50% at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question.

299. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. The district court held that there was "no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances." *Id.* at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code section 34-20-6-4 had been established. *Id.*

300. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003).

301. *Vaughn*, discussed at length earlier, is noteworthy here because transfer may be granted by the Indiana Supreme Court. The Indiana Court of Appeals determined that a genuine issue of material fact precluded summary judgment on the applicability of the misuse defense. The trial court found that Vaughn misused the coal sump to the extent that it was not foreseeable for Daniels to expect that Vaughn would "fail to [properly secure himself] when working at heights and for a bolt to 'foul' in the steel of the pipe [Vaughn] was attempting to maneuver in place." *Id.* (citation omitted). Daniels pointed to record evidence showing that Vaughn was not using the sump for its intended use to process slurry at the time he was injured and that the sump was not capable of being operated for its intended purpose during installation when Vaughn was injured. *Id.* at 1129-30. Vaughn countered by arguing that "the mere fact the blueprints show that a ladder allowed access into the sump means that he was using the sump in a foreseeable manner." *Id.* Vaughn also pointed to his own deposition to the effect that other sites utilizing sumps had steel overhead from which hangers could be used to hold the pipe during installation. Vaughn's expert added that "[t]he design of the facility to house the heavy media sump did not include a beam to suspend a chain hoist to afford safe assembly and maintenance disassembly of heavy and long pipe components." *Id.* (citation omitted).

defense. In *Burt*,³⁰² an Indiana federal district court recognized that the misuse of a product operates as a complete defense. Two other Indiana Court of Appeals decisions, *Indianapolis Athletic Club v. Alco Standard Corp.*³⁰³ and *Morgen v. Ford Motor Co.*,³⁰⁴ have held that a misuse is a “complete” defense under the IPLA, recognizing that the facts giving rise to a misuse defense effectively create an unforeseeable intervening cause, thus eliminating any need to compare fault.³⁰⁵ On the other hand, decisions in cases such as *Chapman v. Maytag*³⁰⁶ and *Barnard v. Saturn Corp.*³⁰⁷ have determined that the degree of a user’s or a consumer’s misuse is a factor to be assessed in determining that user’s or consumer’s “fault,” which must then be compared with the “fault” of the alleged tortfeasor(s). The Indiana Supreme Court in *Morgen v. Ford Motor Co.*,³⁰⁸ acknowledged the conflicting authority but did not address the issue.

The debate is interesting. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant.³⁰⁹ In addition, the IPLA now requires the trier of fact to compare the “fault” (as the term is defined by statute) of the person suffering the physical harm, as well as the “fault” of all others whom caused or contributed to cause the harm.³¹⁰ The IPLA mandates that “[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.”³¹¹

302. *Burt*, 212 F. Supp. 2d at 893.

303. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

304. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002).

305. *Id.*

306. 297 F.3d 682 (7th Cir. 2003).

307. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, “the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action.” *Id.* at 1029. The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* “By specifically directing that the jury compare all “fault” in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme.” *Id.* at 1030. Notwithstanding that conclusion, the *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that “no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for the injuries that he sustained.” *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question.

308. 797 N.E.2d 1146, 1148 n.3 (Ind. 2003).

309. IND. CODE § 34-20-7-1 (2004).

310. *Id.* § 34-20-8-1(a).

311. *Id.* § 34-20-8-1(b).

The statutory definition of "misuse" seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser's conduct. That would tend to explicitly demonstrate that "misuse" is not "fault." The district judge in *Chapman* recognized as much. As he also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement and a plaintiff's misuse arguably falls within Indiana Code section 34-6-2-45(a)'s definition of "fault."

That the General Assembly may not have overtly indicated that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem equally likely that the legislature's silence on the matter indicates an implicit recognition that the "complete" nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties.³¹²

C. *Modification and Alteration*

Indiana Code section 34-20-6-5 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.³¹³

Although this survey article does not address in detail any modification or alteration cases, practitioners should recognize that the alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, Indiana Code section 34-20-2-1 provides that

a person who sells, leases, or otherwise puts in to the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.³¹⁴

312. Before the 1995 amendments to the IPLA, misuse was a "complete" defense. *E.g.*, *Estrada v. Schmutz Manufacturing Co.*, 734 F.2d 1218 (7th Cir. 1984).

313. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994).

314. IND. CODE § 34-20-2-1.

Accordingly, if a claimant cannot establish or if a defendant conclusively proves that the product underwent some “substantial alteration” between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief as a threshold matter.³¹⁵

CONCLUSION

The 2004 survey period, like others in recent years, illustrates that the IPLA has not provided complete guidance with regard to some important policy decisions. Courts applying Indiana law are doing their part to make those decisions. This is no doubt a thought-provoking time for product liability practitioners in Indiana.

315. Indiana Pattern Jury Instruction 7.05(C) does not correctly reflect Indiana law in this regard. There is undeniable overlap within the statutory framework in this context. Because the alteration defense is incorporated directly into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1, there should be little controversy that the alteration/modification defense is “complete” in nature by the very statute that imposes product liability in Indiana as a threshold matter. If a claimant cannot establish, or if a defendant conclusively proves, that the product underwent some “substantial alteration” between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief.