

WHEN IS A DOOR NOT A DOOR? A REFRESHER ON MISUSE AS A DEFENSE TO PRODUCTS LIABILITY CLAIMS

By Kevin D. Lichtenberger and Alex Martin

The title of this article is the setup to a classic joke that many, if not all, have heard. The punchline: *When it's ajar*. While this joke is a humorous play-on-words, it provoked a great deal of thought for these authors when (over) analyzed in the context of products liability law. A consumer who uses a product for a purpose or in a manner that the manufacturer did not intend may be found at the other end of a misuse defense. This article provides its readers with a refresher on our Supreme Court's current analysis and framework of the misuse defense within the Indiana Products Liability Act.

INDIANA'S PRODUCT LIABILITY ACT

Manufacturers assemble and distribute a broad range of products. Some products, like vehicles, power tools, and chemical cleaning solutions, are inherently dangerous. Other products, as innocuous as they may seem, are nevertheless capable of causing injury. Manufacturers are under no duty or obligation to ensure their products are incapable of causing harm; although, they are required to fashion and assemble a product that is reasonably fit and safe for its *intended* purpose. When a consumer is injured by a product that was being used in a manner the manufacturer did not intend and could not foresee, the law provides the manufacturer a statutory defense to any claim arising from said injury.

The Indiana Products Liability Act ("IPLA"), Ind. Code §§ 34-20-1-1 et seq., broadly governs actions brought by a user or consumer against a manufacturer or seller for harm caused by a product. To be successful, a plaintiff must prove that the product entered the stream of commerce in a defective, unreasonably dangerous state and that the plaintiff's injury was a result of the dangerous product. Ind. Code § 34-20-2-1. The IPLA provides defendants of product liability claims with three, non-exclusive defenses: (1) incurred risk; (2) misuse of the product; and (3) modification or alteration of the product. Ind. Code § 34-20-6-3 through -20-6-5. Regarding misuse, the IPLA provides:

It is a defense to an action under this article (or IC 33-1-1.5 before its repeal) 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.

Ind. Code § 34-20-6-4.

Thus, these authors ask: When is a door not a door? When is a product no longer the product? How does a consumer's use of a product transform it so that its use falls outside the intent and foreseeable use for which the manufacturer designed it? Litigators have been provided a framework in the Indiana Supreme Court's decision in *Campbell Hausfeld/Scott Fetzer Co. v. Johnson*, 109 N.E.3d 953, 954 (Ind. 2018). Defense attorneys will be gratified to know the Supreme Court held that the misuse defense serves as a complete bar to recovery in a product

liability claim. Any defendant pursuing a misuse defense will want to be well acquainted with this holding.

INDIANA'S VIEW ON MISUSE

In *Campbell*, an American manufacturer of power tools named Campbell Hausfeld/Scott Fetzer Company ("Campbell") distributed its products to retailers throughout the United States. 109 N.E.3d at 954 (Ind. 2018). Campbell designed a mini air die grinder named the TL1120 ("the Grinder"), an eight-inch, hand-held, air-powered tool intended to grind, polish, deburr, and smooth sharp surfaces. *Id.* at 955. The Grinder was packaged in a box with wrenches to loosen the metal receive at its end and to add/remove various attachments. *Id.* Campbell did not include a safety guard because it might prevent its use in tight spaces and obscure the user's view. *Id.* The Grinder came with various warning and instructions including, but not limited to, an instruction manual that stated: "read carefully," "protect yourself [] by observing all safety information," "failure to comply with instructions could result in personal injury," and "read all manuals included with this product carefully." *Id.* The instructions for the Grinder further advised that safety glasses and ear protection were to be worn during operation and that the consumer is not to use a cut-off disc mandrel on the Grinder unless a safety guard is in place. *Id.* Furthermore, the packaging for the Grinder stated in two separate places that the Grinder produces 25,000 RPM and the user should use only attachments rated for a minimum of 25,000 RPM. *Id.*

The consumer/plaintiff, Paul Johnson, purchased the Grinder, read its instructions, and decided to use it to help a friend work on his truck's headlights. *Id.* The plan was to use the Grinder to cut around the truck's headlight opening to fit larger headlights. Johnson attached a cut-off disc to the Grinder using a mandrel. *Id.* Johnson's friend expressed concern with respect to his use of the cut-off disc as it was rated lower than 25,000 RPM. *Id.* Johnson proceeded anyway. Johnson was wearing his prescription eyeglasses, which he believed would suffice as safety glasses. As Johnson began cutting, the cut-off disc broke and a piece struck the left side of his face causing serious injury and eventual loss of his left eye. *Id.* Johnson sued Campbell and asserted failure to warn and defective design claims under the IPLA. *Id.* Campbell filed a motion for summary judgment and argued plaintiff's claims were barred by each of the three affirmative defenses provided under the IPLA.: incurred risk, misuse, and alteration. *Id.* The trial court found that Johnson misused the Grinder by failing to use safety glasses and was at least fifty-one percent at fault for his injuries. *Id.* The trial court granted summary judgment in favor of Campbell on the defective design claim but denied summary judgment on the failure-to-warn claim. *Id.* The court of appeals affirmed in part, reversed in part, and remanded to the trial court finding that Campbell's motion should have been denied in its entirety. *Id.*

On transfer to the Indiana Supreme Court, Johnson argued the Grinder's instructions failed to warn him of the dangers of using the Grinder with a cut-off disc *without* a safety guard. He further argued the Grinder was defective in its design because it was sold without a safety guard and provided no information for the consumer on how to obtain or use one. Johnson further adopted the court of appeals' position that the misuse defense is not a complete defense and should instead be considered with all other fault under Indiana's comparative fault framework. *Id.*

The Supreme Court in a 5-0 decision determined that misuse of a product was a complete bar to recovery. *Id.* at 959. The Court's determination relied on the doctrine of *in pari materia*. *in pari materia* is a doctrine of statutory construction that holds that a statute relating to the same subject matter should be construed together to produce a "harmonious statutory scheme." *Id.* at 958 (quoting *Bonnell v. Cotner*, 50 N.E.3d 361, 367 n.5 (Ind. 2016)). The explanation was fairly simple. the statutory defenses of incurred risk and product alteration both act as complete bars to recovery, so the misuse defense should not be treated any differently. *Id.* at 958. The Court also noted that if misuse were merely a consideration in deciding comparative fault, it would negate the reason for having statutory defenses in the first place. Lastly, the Court noted that if the legislature wanted to eliminate a statutory defense it would have done so. Since the General Assembly left the defense as part of the statutory scheme, the court reasoned that it must have been intended to act as a complete bar to recovery. *Id.*

With the legal question out of the way, the Court went on to determine that Johnson was barred from recovery because he misused the Grinder. *Id.* at 959–60. Whether a consumer misuses a product is typically a question of fact, as when the undisputed evidence shows the plaintiff misused the product in an unforeseeable manner, such as contravening warning labels and instructions. *Id.* at 959. Thus, since Johnson (1) did not properly wear safety glasses as directed, (2) used the cut-off disc attachment without a guard, and (3) exceeded the RPM limit for the disc he used, the Court found he had misused the product by disregarding proper warning labels. *Id.* at 960.

A REMINDER FOR THE SAVVY DEFENSE LITIGATOR

The Court's decision assists litigators, especially those representing defendants, in clarifying an issue subject to contrary interpretations by the Indiana Court of Appeals and the Seventh Circuit. Before the Act's 1995 amendments, misuse as well as the other statutory defenses had always been complete. After 1995, with the IPLA's adoption of comparative fault principles in products liability actions, our court of appeals and the Seventh Circuit have consistently held that misuse does not operate as a complete bar to recovery.

The Indiana Supreme Court in *Campbell* took the opportunity to set the record straight and adopted the view held by a majority of jurisdictions in the country. This case was a victory for defendants in products liability actions.

CONCLUSION

This article serves as a reminder to defense litigators to use all the tools available to them to aid in the defense of their clients. However, be mindful that, like any other affirmative defense, the defendant bears the burden of proof. When it comes to proving misuse, a defendant must show the misuse of the product is both (1) the cause of the harm and (2) not reasonably expected by the seller. *Id.* at 959. As simple as it may seem, next time you are faced with a product liability claim do not forget to simply ask, "How did you use it?"

Mr. Lichtenberger is an associate at Schultz & Pogue, and Mr. Martin is an associate with Clendening Johnson & Bohrer.