RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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INTRODUCTION

During this survey period[1] the Indiana courts issued a number of significant product liability decisions. The courts discussed how to prove a product defect, clarified the distinction between a product and a service, applied the sophisticated user/bulk supplier doctrine, addressed the issue of when the statute of limitations begins to run, and defined additional parameters for the introduction of expert testimony under *Daubert*.[2]

I. PROVING PRODUCT DEFECT

In *Ford Motor Co. v. Reed*,[3] the Indiana Court of Appeals further defined the sufficiency of evidence necessary to prove the existence of a product defect. In that case, approximately six months after the Reeds purchased a new Ford Mustang, the car caught fire while parked in their garage.[4] When Murlin Reed opened the garage door, he found flames coming from inside of the Mustang. He opened the passenger door and put the fire out with a garden hose. After extinguishing the fire, he had difficulty breathing, his head hurt, his lungs hurt, and he was coughing.[5] He eventually required surgery to relieve his continuous headaches and blocked sinuses.[6] The Reeds brought an action against Ford Motor Company ("Ford") for strict liability, alleging a manufacturing defect in the electrical components within the Mustang's console.[7]

At trial, the court instructed the jury that the Reeds could prove the existence of a defect in one of four ways:

1. [p]laintiffs may produce an expert to offer direct evidence of a specific manufacturing defect;
2. plaintiffs may use an expert to circumstantially prove that a specific defect caused the product failure;
3. plaintiffs may introduce direct evidence from an eyewitness of

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1. October 1, 1997 to September 30, 1998.
2. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
3. 689 N.E.2d 751 (Ind. Ct. App. 1997)
4. *Id.* at 752.
5. *See id.* at 753.
6. *See id.*
7. *See id.*

the malfunction, supported by expert testimony explaining the possible causes of the defective condition; and

4. plaintiffs may introduce inferential evidence by negating other possible causes.[8]

At both the end of the Reeds' case and again at the close of all evidence, Ford moved for a judgment on the evidence, claiming that there was insufficient evidence to prove a defect in the Mustang or to prove that Murlin Reed's injuries were proximately caused by the fire.[9] The trial court denied both motions and Ford appealed, arguing that "although there was testimony that the fire in question started in the Mustang's center console, no witness could pinpoint the identity of the specific defect."[10]

The court of appeals first noted that the trial court's jury instruction on proof of defect was taken from a decision that questioned whether Indiana recognized the doctrine of *res ipsa loquitur* for proof of a manufacturing defect.[11] Although pointing out that *res ipsa loquitur* is inappropriate in a product liability action under Indiana law,[12] the court nevertheless adopted the four methods of proof set forth in the jury instruction as "helpful tools" in determining whether there was sufficient evidence to prove the existence of a defect.[13]

Relying on *Bishop v. Firestone Tire & Rubber Co.*,[14] Ford argued that a defect in the Mustang was not necessarily proven simply because the product failed.[15] In *Bishop*, the plaintiff was injured when a lock ring assembly separated and ejected from a rim gutter while the plaintiff was repairing tires. Although Bishop's expert testified that the lock ring may separate if incorrectly assembled, there was no evidence that the lock ring actually contained a defect.[16] The court refused to allow an inference that the lock ring was defective merely because it separated and ejected from the rim while the plaintiff inflated the tire because such an inference would be based on undue speculation.[17] Similar to the plaintiff's expert in *Bishop*, the plaintiffs' expert in *Reed* admitted that he could not pinpoint the exact cause of the fire in the Mustang.[18]

Unlike the expert in *Bishop*, however, the Reeds' expert did opine that the specific cause of the fire was a failure of the electrical components within the console that are associated with the keypad for the mirrors and also identified a

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8. *Id*. at 753. This instruction was based on the test for proving the existence of a defect set forth in *Whitted v. General Motors Corp.*, 58 F.3d 1200, 1207 (7th Cir. 1995).

9. *See Reed*, 689 N.E.2d at 753.

10. *Id.*

11. *Id.* at 754.

12. *Id*. at 754 (citing SCM Corp. v. Letterer, 448 N.E.2d 686 (Ind. Ct. App. 1983)).

13. *Id.*

14. 814 F.2d 437 (7th Cir. 1987).

15. *See Reed*, 689 N.E.2d at 755.

16. *See Bishop*, 814 F.2d at 443.

17. *Id*.

18. *Reed*, 689 N.E.2d at 755.

wire taken from the console that evidenced electrical fault.[19] In addition, the Reeds "all but eliminate[d] every possibility but a defect in the console."[20] They had owned the car for only five months, and the fire occurred in an area of the car to which they did not have access.[21] "Absent some indication of an extraneous cause, the fact that there was a fire is also circumstantial evidence that there was a defect."[22] The court concluded that this, combined with the plaintiffs' expert's opinion that an electrical defect in the console caused the fire, was enough evidence for the jury to conclude that a defect in the console caused the fire.[23] The trial court's denial of Ford's motion for judgment on the evidence was therefore affirmed.[24]

Shortly after the Indiana Court of Appeals announced its decision in *Reed*, the United States Court of Appeals for the Seventh Circuit again addressed the issue of product defect in *Moss v. Crosman Corp.*[25] The court was faced with the question of whether under Indiana's Product Liability Law a BB gun may be considered defective and unreasonably dangerous because of its design or warnings.[26]

In *Moss*, Larry Moss bought his seven-year-old son, Josh, a Crosman 760 Pump Master BB Gun. On September 28, 1993, Josh was playing with the BB gun when his eleven-year-old cousin, Tim Arnett, came over. When it was Tim's turn to shoot, Josh hid behind a tree located fifteen feet in front of where Tim was standing. Tim pumped the gun three or four times and fired. At that instant, Josh poked his head out from behind the tree, was struck in the eye, and died almost immediately when the BB entered his brain.[27]

Josh's parents (the "Mosses") sued Crosman Corporation, the manufacturer of the gun, Coleman, a former owner of Crosman, and Kmart Corporation, the seller of the gun.[28] They claimed that "the defendants caused Josh's death by selling an air gun with a dangerous velocity and by failing to provide adequate warnings detailing the dangers associated with the gun."[29] The claim against Coleman was later dismissed by stipulation.[30] After preliminary discovery, the district court, applying Indiana law, granted the motion for summary judgment filed by Crosman and Kmart.[31] The Mosses appealed, but the Seventh Circuit

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19. *See id.*
20. *Id.*
21. *See id.*
22. *Id*.
23. *Id*.
24. *See id*.
25. 136 F.3d 1169 (7th Cir. 1998).
26. *Id.* at 1171.
27. *See id.* at 1170-71.
28. *See id.* at 1171.
29. *Id.*
30. *See id.*
31. *See id.*

affirmed the district court's judgment.[32]

Although they couched their argument in design defect language, the Mosses claimed that the Pump Master had far more firepower than they or any other reasonable person would have expected.[33] The court noted that "this is not a claim that the air gun was failing to perform the functions for which it had been designed . . . [or] that some alternative design would have made a gun with the same firepower more safe."[34] Rather, "it is a complaint about the Moss lack of knowledge concerning this gun, and their failure to appreciate what kind of weapon they had purchased for their young son."[35] In short, the Moss' defective design argument boiled down to a failure to warn theory.[36] The Mosses were claiming that, had they known how far, or how fast, and with what penetrating power that the pellets shot from the Pump Master would go, they might have made a different decision.[37]

With respect to the failure to warn theory, the court addressed the issue of whether the Mosses were "entitled to reach the jury on a showing that the air gun was defective because of inadequate warnings alone, or if . . . there is an independent requirement under [Indiana] law to show that the product is unreasonably dangerous."[38] After observing that the answer to this question is unclear under Indiana law, the court held that "Indiana continues to require a showing of unreasonable danger as one element of the plaintiff's case."[39]

The court noted that Indiana "defines the term 'unreasonably dangerous' to refer to 'any situation in which the use of a product exposes the consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer . . . .'"[40] The Mosses argued that, even if the average person knows that BB guns "can cause flesh wounds, loss of eyes, etc.," that same person might be "specifically unaware that a BB gun would be as powerful as the Pump Master and thus could cause death."[41] However, the court stated that "the 760 Pump Master did not place users at risk of injuries *different in kind* from those an average consumer might anticipate."[42] The fact that the gun caused death rather than serious injury did "not transform the fundamental nature of the injury."[43] Thus, according to the court, the 760 Pump Master could not be regarded as unreasonably dangerous because the average person is aware of the danger that

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32. *Id.*

33. *See id.* at 1173.

34. *Id.*

35. *Id*.

36. *See id*.

37. *See id*.

38. *Id*. at 1174.

39. *Id*.

40. *Id*. (quoting IND. CODE § 33-1-1.5-2(7) (Supp. 1997) (recodified at IND. CODE § 34-6-2-146 (1998)).

41. *Id.* at 1175.

42. *Id*. (emphasis added).

43. *Id*.

a projectile fired from a BB gun can hit a person and cause serious injury.[44] The court therefore affirmed summary judgment in favor of the defendants because the Mosses could not prove that the gun was unreasonably dangerous.[45]

Alternatively, the Seventh Circuit held that "the defendants would be able to establish the affirmative defense of incurred risk."[46] To gain the protection of this defense, "'it is not enough that a plaintiff merely have a general awareness of a potential for mishap.'"[47] Rather, the defense "'demands a subjective analysis focusing upon the plaintiff's actual knowledge and appreciation of the specific risk and a voluntary acceptance of that risk.'"[48] The court found the evidence "overwhelming that Larry Moss was fully aware that the 760 Pump Master could pierce the eye and flesh. He saw the warning about death and assumed that it meant the gun could kill birds and small animals."[49] Larry gave warnings to his son that spoke "eloquently about his knowledge of the risks the gun posed."[50] Consequently, "Larry [Moss] incurred the risk of the type of injury Josh suffered when [Larry] bought the gun."[51]

The United States Court of Appeals for the Seventh Circuit also discussed how to prove a product defect under Indiana law in *McMahon v. Bunn-O-Matic Corporation*.[50] In that case, Jack and Angelina McMahon were on a long-distance auto trip. They stopped at a Mobil station to buy a cup of coffee. Jack asked Angelina to remove the plastic lid while he drove. Angelina decided to pour some of the coffee into a small cup that would be easier for Jack to handle. In the process, the coffee flooded her lap, and Angelina suffered second and third degree burns causing pain and scars on her left thigh and lower abdomen.[51] The McMahons believed that the foam cup collapsed either because it was poorly made or because inordinately hot coffee weakened its structure. They sued the producers of the cup and lid and the manufacturer of the coffee maker.[52]

The McMahons' claims against the producers of the cup and lid were settled.[53] Their claims against the manufacturer of the coffee maker, Bunn-O-Matic, were summarily resolved by the district court in favor of Bunn-O-Matic.[54] The district court observed that both McMahons conceded during their depositions that "'hotness' was one of the elements they value in coffee and that

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44. *Id*.

45. *Id.*

46. *Id*. (citing IND. CODE 33-1-1.5-4(b)(1) (Supp. 1997) (recodified at IND. CODE § 34-20-6-3 (1998)).

47. *Id*. (quoting Clark v. Wiegand, 617 N.E.2d 916, 918 (Ind. 1983)).

48. *Id*. (quoting *Clark*, 617 N.E.2d at 918).

49. *Id.* at 1176.

50. *Id*.

51. *Id*.

50. 150 F.3d 651 (7th Cir. 1998)

51. *See id.* at 653.

52. *See id.*

53. *See id.*

54. *See id.*

they sought out hot coffee, knew it could burn, and took precautions as a result."[55] According to the district court, these concessions foreclosed the possibility of recovery.[56]

In its review of the district court's entry of summary judgment in favor of Bunn-O-Matic, the Seventh Circuit Court of Appeals first commented on the parties' litigation strategy.[57] The court noted that, while the McMahons proceeded on the assumption that Bunn-O-Matic made and sold coffee, Bunn-O-Matic actually sold and distributed a tool that retailers use to make coffee.[58] The court found Bunn-O-Matic's failure to challenge this perspective "puzzling."[59] The court asked:

> Why should a tool supplier be liable in tort for injury caused by a product made from that tool? If a restaurant fails to cook food properly and a guest comes down with food poisoning is the oven's manufacturer liable? Our concern is rooted not in the privity doctrine of by gone years but in the belief that tort doctrine must reflect the way in which different actors cooperate to improve safety. Consider the plaintiffs' claim that they should have received warnings. How is a manufacturer of coffee-making machines to deliver them? Many consumers of coffee never see the machine that made it—someone brings coffee to the customer in a cup or pot . . . .; a fast food outlet may deliver a sealed container to a take-out window . . . or place the coffee maker so far behind the counter that customers cannot read whatever warnings it bears. And coffee makers are small; where would a warning more elaborate than "Hot!" go? If warnings are in order, then, they belong on a restaurant's menu, or on the cups containing take-out coffee.[60]

Nevertheless, because both sides treated Bunn-O-Matic and the retailer of the coffee identically, the court of appeals proceeded on that basis "while doubting that it is sound."[61]

The McMahons first claimed that Bunn-O-Matic failed to warn consumers about the severity of burns that hot coffee can produce.[62] Yet, the McMahons already knew that coffee is served hot and that it can cause burns and, according to the court, did not need to be reminded.[63] Furthermore, the court observed:

> What would this warning have entailed? . . . [T]hat this coffee was unusually hot and therefore capable of causing severe burns? Warning

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55. *Id.* at 654.
56. *See id*.
57. *Id.*
58. *Id*.
59. *Id*.
60. *Id*. at 654-55.
61. *Id*. at 655.
62. *See id.*
63. *Id*.

> consumers about a surprising feature that is potentially dangerous yet hard to observe could be useful, but the record lacks any evidence that 179 [degrees Fahrenheit] is unusually hot for coffee. Neither side submitted evidence about the range of temperatures used by commercial coffee makers, or even about the range of temperatures for Bunn's line of products. The McMahons essentially ask us to take judicial notice that 179 [degrees Fahrenheit] is abnormal, but this is not the sort of incontestable fact for which proof is unnecessary.[64]

The court also noted other judicial opinions reporting an industry standard serving temperature between 175 and 185 degrees Fahrenheit and noted that "most consumers prepare and consume hotter beverages at home."[65] Finally, the court referenced the American National Standards Institute's ("ANSI's") standard for home coffee makers which allowed for the brewing and holding of coffee at a temperature not falling below 170 degrees Fahrenheit.[66] Accordingly, the court concluded that "coffee served at 180 [degrees Fahrenheit] by a roadside vendor, which doubtless expects that it will cool during the longer interval before consumption, does not seem so abnormal as to require a heads-up warning."[67]

Nonetheless, "[t]he McMahons insist[ed] that, although they knew that coffee can burn, they thought that the sort of burn involved would be a blister . . ., not a third degree burn."[68] In rejecting this claim, the court reasoned that Bunn-O-Matic could not be expected to deliver a medical education with each cup of coffee.[69] The court went on to note that insistence on more detail can make "any warning, however elaborate, seem inadequate."[70]

> Extended warnings present several difficulties, first among them that, the more text must be squeezed onto the product, the smaller the type and the less likely is the consumer to read or remember any of it. Only pithy and bold warnings can be effective. Long passages in capital letters are next to illegible, and long passages in lower case letters are treated as boilerplate. Plaintiff wants a warning in such detail that a magnifying glass would be necessary to read it. Many consumers cannot follow simple instructions (including pictures) describing how to program their video cassette recorders.[71]

The court noted that "Indiana has the same general understanding."[72]

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64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*. at 656.

68. *Id.*

69. *Id*.

70. *Id.*

71. *Id*. (quoting Todd v. Societe 131C, S.A., 9 F.3d 1216, 1218-19 (7th Cir. 1993) (en banc) (applying Illinois law)).

72. *Id.*

The court further remarked that "Indiana does not require vendors to give warnings in the detail plaintiffs contemplate."[73] Instead, "[i]t expects consumers to educate themselves about the hazards of daily life—of matches, knives, and kitchen ranges, of bones in fish, and of hot beverages—by general reading and experience, knowledge they can acquire before they enter a mini mart to buy coffee for a journey."[74]

The McMahons next contended that any coffee served at more than 140 degrees Fahrenheit is unfit for human consumption and therefore a defective product because of its power to cause burns more severe than consumers expect.[75] The court noted that, in design defect cases, the plaintiff must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product.[76] In other words, a design defect claim in Indiana is based on negligence principles, "subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents."[77] Moreover, the plaintiff must show "not only that the design is defective but also that the defective product is 'unreasonably dangerous.'"[78] In Indiana,

> "unreasonably dangerous" refers to any situation in which the use of the product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.[79]

The McMahons argued that, although they knew coffee could burn, Bunn-O-Matic's coffee "exposed them to harm extending beyond that contemplated by the ordinary consumer."[80] The court referred to several Indiana cases having rejected claims that a "consumer's failure to appreciate the gravity of the damage a product could do made it 'unreasonably dangerous,' [especially] when the consumers understood that the product could cause a serious injury."[81] Nonetheless, the court did not decide whether a third degree burn is a harm not contemplated by the ordinary consumer because, even if hot coffee may be considered unreasonably dangerous, the record was devoid of evidence showing that the coffee maker was defectively designed.[82]

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73. *Id.*

74. *Id*. at 656-57.

75. *See id*. at 654.

76. *Id*. at 657.

77. *Id*. (citations omitted).

78. *Id*.

79. *Id*. (quoting IND. CODE § 31-1.5-2(7) (Supp. 1997) (recodified at IND. CODE § 34-6-2-146 (1998)).

80. *Id.*

81. *Id*. (citing Moss v. Crosman Corp., 136 F.3d 1169, 1173-74 (7th Cir. 1998); Anderson v. P.A. Radosy & Sons, Inc., 67 F.3d 619, 624-26 (7th Cir. 1995)).

82. *Id*.

The McMahons attempted to show that the coffee maker was defectively designed by the testimony of Professor Diller.[83] Professor Diller opined that "at the temperatures at which this coffee was brewed and maintained the structural integrity of the foam cup into which the coffee was poured would be compromised making it more flexible and likely to give way or collapse when its rigged lid is removed."[84] Not only did the court disagree with laying this purported effect "at the door of Bunn rather than the cup's producer . . . or the retailer," the court further noted that Professor Diller offered nothing more than a bare conclusion.[85] He did not explain or empirically support his conclusion.[86] He did not explain how hot beverages could make foam cups too flexible, how much more flexible and under what circumstances, how likely to collapse the cups became, and how the failure rate of the cups varied with temperature.[87] According to the court, "'[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.'"[88] Accordingly, Diller's affidavit was found to be inadmissible under *Daubert*.[89] Without Diller's affidavit, the McMahons had no evidence to support their theory of a design defect.[90]

Alternatively, the McMahons argued that the coffee should not have been served at more than 135 to 140 degrees Fahrenheit.[91] In a well-written, common sense passage, the court responded:

> [P]eople spend money to increase their risks all the time—they pay steep prices for ski vacations; they go to baseball games where flying bats and balls abound; they buy BB guns for their children knowing that the pellets can maim. They do these things because they perceive benefits from skiing, baseball, and target practice . . . . Indiana does not condemn products as defective just because they are designed to do things that create serious hazards. . . . To determine whether a coffee maker is defective because it holds the beverage at 179 [degrees Fahrenheit], we must understand the benefits of hot coffee in relation to its costs. As for costs, the record is silent. We do not know whether severe burns from coffee are frequent or rare. On the other side of the ledger, there are benefits for all coffee drinkers. Jack McMahon testified that he liked his coffee hot. Why did the [ANSI] set 170 [degrees Fahrenheit] as the minimum temperature at which coffee should be ready to serve? Diller

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83. *See id.*

84. *Id*.

85. *Id*.

86. *See id*. at 658.

87. *See id*. at 657.

88. *Id*. at 658 (quoting Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)).

89. *See id*. (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)).

90. *See id*.

91. *See id.*

> does not make any effort to reconcile his "maximum 140 [degrees Fahrenheit]" position with the ANSI's "minimum 170 [degrees Fahrenheit]" position—though this is something that an engineer would be sure to do in scholarly work. Without some way to compare the benefits of a design change (fewer and less severe burns) against the costs (less pleasure received from drinking coffee), it is impossible to say that designing a coffee maker to hold coffee at 179 [degrees Fahrenheit] bespeaks negligent inattention to the risks.[92]

The court refused to consider it obvious that consumers derive no benefit from coffee served at temperatures hotter than 140 degrees Fahrenheit.[93] While the court found it easy to sympathize with Angelina McMahon, it noted that using the legal system to shift the costs of her injuries to someone else would have bad consequences for coffee connoisseurs who like their coffee hot.[94] "First-party health and accident insurance deals with injuries of the kind Angelina suffered without the high costs of adjudication, and without potential side effects such as luke warm coffee."[95]

II. PRODUCT VS. SERVICE

In *Whitaker v. T.J. Snow Co.*,[96] the Seventh Circuit Court of Appeals addressed whether the refurbishing of equipment constituted the provision of a service instead of the manufacturing of a product. The plaintiff in *Whitaker* was injured when her hand was caught in the pinch point of a seam welder as the welder reactivated in the middle of a weld cycle.[97] The plaintiff's employer, Walker, hired T.J. Snow Company ("Snow") to upgrade the electrical circuits of the seam welder. Snow added a new programming unit, several new circuits, and a new weld control; designed and built a water catch basin; and, cleaned and painted the machine. The shop order specifically prohibited Snow from rebuilding the basic welder.[98] Snow neither designed any of the new component parts, nor changed the welder's mechanical function. The parties agreed that the work Snow performed extended the useful life of the machine.[99] Snow was supposed to inspect the seam welder to determine if any guarding was necessary for pinch points, and, if so, to either furnish the required guards or tell Walker they were needed. Snow nevertheless failed to install any guards, to warn Walker, or to place warning stickers on exposed pinch points.[100]

In the trial court, the plaintiff waived her negligence claim and pleaded only

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92. *Id*.
93. *Id*. at 658-59.
94. *Id*. at 659.
95. *Id*.
96. 151 F.3d 661 (7th Cir. 1998).
97. *See id.* at 663.
98. *See id.* at 662.
99. *See id.*
100. *See id*. at 663.

a warranty theory.[101] The plaintiff did not argue, however, that Snow installed any defective parts or that its work was otherwise unsatisfactory. Her only theory was that, given the extent of work performed by Snow on the machine, Snow was transformed into a manufacturer of the machine and was therefore liable for failing to ensure that parts of the machine unrelated to the work it performed had the proper guards and warnings.[102] The federal district court granted Snow's motion for summary judgment.[103] The district court found that Snow had neither sold, leased, nor otherwise placed the welder into the stream of commerce when it refurbished the machine for Walker.[104] The district court also found that the work Snow had performed was predominantly a service rather than a manufacture of a product and therefore fell outside the scope of the Indiana Product Liability Act.[105] On appeal, Whitaker limited her arguments to Snow's strict liability claim and focused on the product/service issue.

The Seventh Circuit first noted that the Indiana Product Liability Act, by its terms, does not apply to transactions which "'involve[ ] wholly or predominantly the sale of a service rather than a product.'"[106] This particular transaction was not "wholly" the sale of a service because Snow procured and installed component parts in the welder.[107] Thus, the issue was whether the transaction was "predominantly" for the sale of a service.[108]

After reviewing prior Indiana appellate and Seventh Circuit decisions in which the product/service distinction was addressed, the court in *Whitaker* determined that the critical question was whether the "predominant thrust" of the contract was for the sale of goods or for the rendering of services.[109] "The key distinction is between the repair or improvement of an existing machine, and the construction or rebuilding of a new machine."[110] Whether the work adds useful life to the equipment is not determinative because even routine maintenance adds to useful life.[111] Although the court conceded that the refurbishing work here went beyond routine maintenance, Snow's work focused on replacement of certain component parts specified by Walker and making sure that the machine

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101. *See id.*

102. *See id*. at 666.

103. Although Whitaker's amended complaint alleged only a warranty claim, Snow's motion for summary judgment briefed both the warranty issue and a claim for strict liability under the Indiana Product Liability Act. Because both parties addressed the strict liability issue in their summary judgment briefs, the Seventh Circuit found that the complaint had been constructively amended to include the strict liability claim. *Id*. at 663.

104. *See id.* at 662.

105. *See id*. at 664.

106. *Id*. (quoting IND. CODE § 33-1-1.5-2(6) (Supp. 1997) (modification in original) (recodified at IND. CODE § 34-6-2-114 (1998)).

107. *See id*.

108. *See id*.

109. *Id*.

110. *See id*. at 665-66.

111. *Id*. at 666.

was working properly. This was more like "custom work" than the manufacture of either the full seam welder or component parts for the machine.[112] The appellate court thus affirmed the summary judgment in Snow's favor.

III. SOPHISTICATED USER/BULK SUPPLIER DOCTRINE

In *Downs v. Panhandle Eastern Pipeline Co.*,[113] the Indiana Court of Appeals applied the "bulk supplier" doctrine to the supplier and transporter of natural gas.[114] In *Downs*, a local municipal gas utility purchased natural gas from Vesta. The gas was produced by Vesta from gas fields in Kansas and transported to the local gas utility through a pipeline system operated by Panhandle. The natural gas was produced and transported without an odorant. The local gas utility added an odorant after receiving the gas into its own system.[115] The local gas utility's distribution lines were over fifty years old and included home service lines made of bare steel pipe. Natural gas from a corroded steel service line seeped into the Downs' house where it was ignited by a wood burning stove. The Downs family was seriously injured by the explosion. Downs brought an action against numerous defendants, including Vesta and Panhandle.[116] Among many theories asserted against Vesta and Panhandle, Downs included claims for negligent failure to warn under the Restatement (Second) of Torts section 388[117] and for strict liability failure to warn under the Product Liability Act.[118] The trial court

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112. *See id*.

113. 694 N.E.2d 1198 (Ind. Ct. App. 1998).

114. This is the second time this case has reached the Indiana Court of Appeals on similar issues. *See* Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155 (Ind. Ct. App. 1997), *reviewed in*, R. Robert Stommel & Dina M. Cox, *Recent Developments in the Indiana Law of Product Liability*, 31 IND. L. REV. 707, 715 (1998).

115. *See Downs*, 694 N.E.2d at 1200.

116. *See id.* at 1201.

117. Section 388 of the Restatement (Second) of Torts provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
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> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
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> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
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> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS § 388 (1965).

118. *See Downs*, 694 N.E.2d at 1201. Indiana's Product Liability Act states, in relevant part, that a product is defective if the seller fails to:

> (1) properly package or label the product to give reasonable warnings of danger about

granted summary judgment to Vesta and Panhandle on both theories, and Downs appealed.[119]

In its analysis of the Downs' Restatement (Second) of Torts section 388 claim, the *Downs* court first noted that section 388 imposes on a supplier of dangerous goods a duty to inform the consumer of the facts that make the goods dangerous.[120] Because Panhandle was only the transporter and not the "supplier" of the natural gas, this theory did not apply to Panhandle.[121] Vesta was therefore the only defendant subject to potential liability under section 388.[122] The court then analyzed the section 388 claims against Vesta by applying the "bulk supplier" doctrine.[123]

Relying on a decision by the Supreme Court of Kansas,[124] the court held that a bulk supplier of natural gas has no duty to warn the ultimate consumer if the distributor of the gas has adequate knowledge of the dangers associated with the gas it purchases from the bulk supplier.[125] The bulk supplier's duty to warn the distributor is satisfied when the distributor knows of the dangerous characteristics of the gas and safe methods for handling it, and the distributor has operated a business distributing it for many years.[126] Here, the local gas utility "was well aware of the dangers associated with transporting natural gas and . . . of the potential problems with its own distribution system."[127] The local utility had developed programs to detect and repair leaks and corrosion. An employee of the utility admitted the potential safety problems that could arise with the use of bare steel pipes to distribute the gas. The utility even undertook to warn its own customers of the dangers of gas. The evidence presented on summary judgment thus failed to show, under section 388(b), that the local gas utility was not fully aware of the dangers associated with distributing gas generally or through its own pipelines.[128] Because the local gas utility was adequately warned of the dangers, Vesta, as a bulk supplier, had no duty to directly warn the Downses.[129]

The appellate court next addressed Downs' theory of strict liability for

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the product; or

(2) [illegible] instructions available to the user or consumer.

IND. CODE § 34-20-4-1 (1998) (formerly IND. CODE § 33-1-1.5-2.5 (1993)).

119. *See Downs*, 694 N.E.2d at 1200.

120. *Id.* at 1207.

121. *See id.*

122. *See id.* at 1207-08.

123. *Id.* at 1208.

124. *Id.* (citing Jones v. Hittle Serv., Inc., 549 P.2d 1383 (Kan. 1976)).

125. *Id.* at 1208.

126. *See id.* (citing Parkinson v. California Co., 255 F.2d 265, 268 (10th Cir. 1958)).

127. *Id.* at 1209.

128. *See id.*

129. *See id.*

failure to warn under the Product Liability Act.[130] Under this theory, the Downs did not argue that Panhandle and Vesta were strictly liable for failing to provide warnings to them directly, but only that Panhandle and Vesta were strictly liable for failure to provide warnings to the local gas utility.[131] Specifically, the Downs contended that the defendants had a duty to warn the local gas utility about using bare steel lines and about using the proper amount of odorant to ensure that their unodorized product would be safer.[132] The court rejected this argument for two reasons.[133] First, as a condition for liability under the Product Liability Act, the product must reach the user or consumer without substantial alteration in the condition in which it is sold.[134] There was no question here that the unodorized gas supplied by Vesta and transported by Panhandle was expected to be substantially altered by the local gas utility's addition of its own odorant.[135] Second, the "bulk supplier" doctrine under section 388 applied equally to the Downs' strict liability failure to warn claims.[136] The Product Liability Act states that where an action is based on failure to warn, the plaintiff must prove that the manufacturer or seller failed to exercise reasonable care under the circumstances in providing the warnings.[137] Under both the Product Liability Act and the Restatement section 388, the supplier of natural gas has no duty to warn the gas distributor if the distributor already has adequate knowledge of the dangers associated with the gas.[138] Because there was no information about natural gas or the handling of gas that could have been provided by Panhandle and Vesta that would have improved the local gas utility's knowledge, Panhandle and Vesta did not fail "to exercise reasonable care under the circumstances" by not providing warnings to the local utility.[139]

In another case addressing the sophisticated user/bulk supplier doctrine, *Taylor v. Monsanto Co.*,[140] the Seventh Circuit Court of Appeals affirmed the federal district court's grant of summary judgment based on the sophisticated user doctrine.[141] The plaintiffs in *Taylor* sued Monsanto, the manufacturer of polychlorinated biphenyls ("PCBs"), for injuries they claimed were the result of

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130. *Id.* at 1210.

131. *See id.* at 1211.

132. *See id.*

133. *Id.* at 1211-12.

134. *See id.* at 1211 (citing IND. CODE § 33-1-1.5-3(a) (Supp. 1997) (recodified at IND. CODE § 34-20-2-1 (1998)).

135. *See id.*

136. *See id*. at 1212.

137. *See id.* (citing IND. CODE § 33-1-1.5-3(b) (Supp. 1997) (recodified at IND. CODE § 34-20-4-1 (1998)).

138. *See id.*

139. *Id.* (quoting IND. CODE § 33-1.1.5-3(b) (Supp. 1997) (recodified at IND. CODE § 34-20-4-2 (1998)).

140. 150 F.3d 806 (7th Cir. 1998).

141. *Id.* at 807. The federal district court opinion is reported in *Baker v. Monsanto Co.*, 962 F. Supp. 1143 (S.D. Ind. 1997), *reviewed in* Stommel & Cox, *supra* note 114, at 715.

workplace exposure to PCBs while employed by Westinghouse Electric Company ("Westinghouse").[142] The Seventh Circuit first noted that Indiana courts have clearly recognized the "sophisticated intermediary" defense, which holds that the manufacturer has no duty to warn the ultimate user when the product is sold to a "knowledgeable or sophisticated intermediary" whom the manufacturer has adequately warned. In order for this doctrine to apply, the intermediary "must have knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer."[143] The court then noted that the issue framed on appeal presented no questions of law, only factual issues regarding whether Westinghouse was a sophisticated intermediary to whom Monsanto had given adequate warnings about PCBs.[144]

In determining whether Westinghouse was a "sophisticated intermediary," the court reviewed the "uncontroverted evidence that Westinghouse was highly sophisticated about PCBs."[145] Westinghouse gave Monsanto its own specifications for the PCB fluids to be produced, which were delivered by Monsanto in large quantities by railroad car, tank truck, and fifty-five-gallon drums. Westinghouse had used PCBs for over forty years, had developed vast in-house medical, engineering, and environmental expertise about PCBs, and had prepared its own Material Safety Data Sheets for PCB-laden fluids. Westinghouse's knowledge of PCBs was so sophisticated that it participated in federal and industry task forces and working committees on PCBs.[146]

In an attempt to overcome this evidence, the plaintiffs argued that, although Westinghouse may have been expert about environmental matters related to PCBs, it was unsophisticated about the human health hazards associated with PCBs.[147] The court rejected this argument on two grounds.[148] First, the court rejected the plaintiffs' attempt to "fine-tune" the sophisticated intermediary doctrine to require Westinghouse to have specific expertise on human health issues related to PCBs.[149] The more appropriate view of the level of sophistication required to meet the doctrine is a "broad, multi-factor view."[150] Applying this view, the court took into consideration the plaintiffs' allegation in their complaint that Westinghouse knew of the medical risks of PCBs.[151] Second, the court noted that the record was void of any evidence that Westinghouse was ignorant or unsophisticated about the health effects of PCBs.[152] Instead, the

142. *Taylor*, 150 F.3d at 807.
143. *Id.* at 808.
144. *Id.*
145. *Id.*
146. *See id.*
147. *See id.*
148. *Id.* at 808-09.
149. *Id.* at 808.
150. *Id.* at 809.
151. *Id.*
152. *Id.*

plaintiffs had relied on "conclusory and self-serving allegations unsupported by the record."[153]

The Seventh Circuit next addressed the second prong of the sophisticated intermediary defense: Whether Monsanto had adequately warned Westinghouse about PCBs.[154] The plaintiffs argued that, even if Westinghouse were a sophisticated intermediary, Monsanto nevertheless failed to warn Westinghouse about PCB dangers because the health hazard advisories which Monsanto supplied to Westinghouse were "warnings with a wink" based on misrepresentations Monsanto allegedly made regarding PCB safety.[155] The plaintiffs relied heavily on a statement in a publication by the American National Standards Institute ("ANSI") that PCB exposure caused only limited adverse health effects.[156] Monsanto had provided a copy of the ANSI publication to Westinghouse. The court, however, refused to impute the publication to Monsanto, stating: "ANSI is not Monsanto, and the statements of the former cannot be reasonably imputed to the latter."[157] Although a Monsanto employee chaired the ANSI committee and Monsanto was the sole domestic manufacturer of PCBs, the Seventh Circuit found that "it simply pushes the matter too far to impute the ANSI committee's statement to Monsanto" and "[n]o reasonable jury could find otherwise."[158] The court also noted correspondence from Monsanto to Westinghouse's Personnel Department in which Monsanto warned at length about the risk of skin irritation, chloracne, injury to cellular tissue, serious liver injury, and even death from PCB exposure.[159] Because the letter described PCBs as potentially dangerous substances that should be properly handled in a safe manner, it would be unreasonable as a matter of law for a jury to interpret the letter otherwise.[160]

Having satisfied itself that Westinghouse was sophisticated about PCBs and that Monsanto warned Westinghouse about the dangers of PCBs with more than a "wink," the Seventh Circuit held that the "sophisticated intermediary doctrine" applied and affirmed the district court's grant of summary judgment in favor of Monsanto.[161]

IV. STATUTE OF LIMITATIONS

During this survey period, the Indiana Court of Appeals once again addressed the issue of when the statute of limitations begins to run in a chemical exposure

153. *Id*.
154. *Id.*
155. *See id*.
156. *See id.*
157. *Id*. at 809-10.
158. *Id*. at 810.
159. *Id.*
160. *See id*.
161. *Id*.

product liability case. In *Degussa Corp. v. Mullens*,[162] the plaintiff worked for an animal feed company where she mixed powdered and liquid ingredients into livestock feeds.[163] She claimed to suffer permanent lung damage due to her exposure to the ingredients that were manufactured by the defendants.[164] The defendants moved for summary judgment based on the two-year statute of limitations contained in the Product Liability Act.[165] The trial court denied their motion, and the defendants obtained an interlocutory appeal.[166]

On appeal, the plaintiff argued that there was no evidence that any doctor had determined, more than two years before she filed her complaint, the likely or probable cause of her medical condition and that her condition was likely or probably caused by her chemical exposure at work.[167] Based on its review of prior Indiana and Seventh Circuit opinions interpreting when a cause of action "accrues" under the two-year statute of limitations, the court in *Mullens* rejected the plaintiff's suggested standard.[168] After noting that the "discovery rule provides a two-year period during which a potential plaintiff has a fair opportunity to investigate,"[169] the court stated: "The discovery rule does not toll the statute of limitations until all uncertainty is eliminated . . . . Rather, once a plaintiff confirms or is informed that a product is a possible cause of her illness, the fair opportunity to investigate for up to two years commences."[170] Thus, the question on appeal was "whether there [was] a genuine issue of material fact with respect to when Mullens had a fair opportunity to investigate the cause of the injury, rather than when she knew the likely or probable cause of the injury."[171]

In February 1992, Mullens went to the emergency room with respiratory problems that began at work. She told the emergency room physician that she worked with chemicals.[172] When her respiratory problems worsened approximately one month later, she visited her family physician and took with her a label from one of the chemicals. Mullens told her family physician that she was exposed to chemicals at work and showed him the label. Her family physician testified that Mullens told him that she thought her exposure to dust at

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162. 695 N.E.2d 172 (Ind. Ct. App. 1998).

163. *Id.* at 173.

164. *See id.* at 173-74.

165. *See id.* at 174. The Product Liability Act provides, in part, that "a product liability action must be commenced: (1) within two (2) years after the cause of action accrues; . . . ." IND. CODE § 34-20-3-1 (1998) (formerly IND. CODE § 33-1-1.5-5 (Supp. 1997)).

166. *See Mullens*, 695 N.E.2d at 174.

167. *See id.* at 176.

168. *Id.*

169. *Id.* The "discovery rule" for accrual of claims arising out of illness caused by prolonged toxic exposure provides that the statute of limitations begins to "run from the date the plaintiff knew or should have discovered that [she] suffered an injury or impingement, and that it was caused by the product or act of another." Barnes v. A.H. Robins Co., 476 N.E.2d 84, 87-88 (Ind. 1985).

170. *Mullens*, 695 N.E.2d at 176 (citations omitted).

171. *Id.*

172. *See id.*

work was contributing to her illness.[173] Although his ultimate diagnosis was unclear at the time, the family physician told Mullens that there was a "possibility" that her medical condition was work related.[174] He also told her that she needed to further investigate the connection between her illness and her work exposure.[175] Mullens acknowledged this conversation.[176] On March 18, 1992, Mullens filled out a worker's compensation form because she suspected that her respiratory problems were caused by workplace exposures. Mullens filed her lawsuit on March 25, 1994.[177]

In an attempt to overcome these facts, Mullens submitted her own affidavit in opposition to the defendants' motion for summary judgment, in which she claimed that she was confused and that she did not know with certainty the source of her problems until March of 1994.[178] Based on the plaintiff's own knowledge and the information provided to her by her physicians, the court determined that Mullens had a fair opportunity to investigate her injury more than two years before she filed her complaint.[179] The court determined that Mullens had a medical condition sufficient to be considered an injury at least by February and March of 1992 and that the evidence relating to her worker's compensation claim and the visits to her family physician clearly established that she suspected her work exposure was a possible cause of her illness.[180] Her suspicions were confirmed by her doctor's statement that the chemicals were a possible cause of her illness.[181] "As such, because Mullens was told that the chemicals were a possible cause of her illness, the fair opportunity to investigate for up to two years commenced at least at that point."[182]

The appellate court also rejected the plaintiff's attempt to create an issue of fact through her own affidavit, stating that "a lack of confusion on a potential plaintiff's part is not the test of when the statute of limitations begins to run."[183] Instead, "the statute begins to run when suspicion arises, not when all confusion or doubt is dissipated."[184] In addition, under the discovery rule, the test for what the plaintiff knew or should have discovered is an objective standard—what a reasonable person should have known, not what the plaintiff actually knew.[185] Here, the uncontradicted evidence that plaintiff took the chemical label to her doctor and that he told her that her condition may be related to her work exposure

173. *See id.*
174. *See id.* at 177.
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id*. at 178.
179. *Id*.
180. *Id*. at 177.
181. *See id*.
182. *Id*. at 178.
183. *Id*.
184. *Id*.
185. *See id*.

was "sufficient to establish that Mullens had a fair opportunity to investigate her injury and its cause at that time."[186] The appellate court, therefore, reversed the trial court's denial of summary judgment and remanded with instructions to enter judgment in favor of the defendants.[187]

V. EXPERT OPINION TESTIMONY

In 1996, the Indiana Court of Appeals specifically adopted the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[188] for determining the admissibility of expert scientific testimony under Indiana Rule of Evidence 702.[189] During this survey period, additional guidance for assessing the admissibility of such evidence was offered by the Seventh Circuit Court of Appeals in *Ancho v. Pentek Corp.*[190]

In *Ancho,* the plaintiff was employed as a process manager at a corrugated cardboard production facility. A Pentek Intelligent Automatic Car ("PIAC") materials handling system, manufactured by Pentek, was in use at the plant. The PIAC consisted of five fixed roller conveyers and an automatic transfer car.[191] The transfer car moved along a rail running north-south set below the floor of the plant, while the top of the car was elevated above the floor. The transfer car was used to carry loads of corrugated board between the roller conveyors at the plant. As the transfer car moved between the various conveyors at the plant, it passed through a number of "pinch points" that could be hazardous to employees due to the transfer car's tendency to catch, pull, pinch, and crush hands, arms, fingers, and feet that became entangled in the car.[192]

The transfer car operated at speeds ranging from .45 miles-per-hour to three-miles-per hour. When the car was in motion, a warning system activated a loud horn as well as flashing lights to warn workers to stay clear of the track. Numerous signs and red stickers were in placed on and about the roller conveyer and transfer car, warning of the risk of hazardous machinery and "pinch points."[193] The plant's floor across which the car operated was marked with yellow lines and red paint. Moreover, electronic sensors attached to the transfer car automatically caused the car to shut down whenever an object was detected traversing the path of the moving car.[194]

On October 4, 1993, the plaintiff was inspecting some corrugated board at

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186. *Id*.

187. *Id*.

188. 509 U.S. 579 (1993).

189. *See* Hottinger v. TruGreen Corp., 665 N.E.2d 593 (Ind. Ct. App. 1996), *reviewed in* R. Robert Stommel & Dina M. Cox, *Recent Developments in the Indiana Law of Products Liability*, 30 IND. L. REV. 1227, 1241 (1997).

190. 157 F.3d 512 (7th Cir. 1998).

191. *See id.*

192. *See id.*

193. *See id.* at 513-14.

194. *See id.* at 514.

one of the roller conveyor locations. While performing the inspection, he moved to the other side of the conveyor and proceeded to walk around the end of the conveyor, requiring him to cross the transfer car rail.[195] He crossed the transfer car's travel aisle without paying attention to the fact that the car was traveling down the rail towards him. His left foot became locked in a "pinch point," and he sustained serious permanent damage.[196]

Plaintiff's expert, Ronald Lobodzinski, submitted a written report prior to trial opining that Pentek's design of the PIAC failed to eliminate the unreasonably dangerous pinch points and failed to provide adequate safety devices to protect persons from the pinch points.[197] He proposed that: (1) the movable transfer car be eliminated from the materials handling system, or (2) safety devices near the pinch points be installed, such as electronic safety devices or mats, which would sense when someone was near the pinch point and thereby stop the transfer car.[198]

Pentek deposed Lobodzinski regarding his qualifications and investigation.[199] Pentek then moved in limine to bar Lobodzinski from testifying at trial, arguing that Lobodzinski did not qualify as an expert pursuant to *Daubert*.[200] The trial court granted Pentek's motion and subsequently entered summary judgment in Pentek's favor.[201] Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit.[202] Plaintiff argued on appeal that the trial court failed to correctly articulate and apply the *Daubert* standard in barring Lobodzinski's testimony.[203]

The appellate court reiterated that Federal Rule of Evidence 702 ("Rule 702") and *Daubert* require a two-step inquiry when evaluating the admissibility of expert testimony.[204] First, the testimony must be reliable—it must have been "subjected to the scientific method" and rise above "subjective belief or unsupported speculation."[205] Second, the testimony must be relevant—it must "assist the trier of fact in understanding the evidence or in determining a fact in issue."[206] Moreover,

> [f]our non-exclusive "guideposts" are pertinent in assessing the reliability and validity of the expert's scientific methodology: "(1) whether [the expert's theory] can and has been tested; (2) whether [his

195. *See id.*
196. *See id.*
197. *See id.* at 514.
198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.* at 514-15.
202. *See id.* at 515.
203. *See id.*
204. *Id*.
205. *Id*.
206. *Id*.

> theory] has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the general acceptance of the theory."[207]

Furthermore, the court noted that the *Daubert* court did not presume to set out a "'definitive checklist or test.'"[208] Rather, the district court judge's inquiry was intended to be "'flexible.'"[209]

The court of appeals noted that Lobodzinski had no expertise in plant design and had not observed the transfer car in operation, "much less even take the time to visit the accident site."[210] While the district court judge did not specifically mention the four guideposts of *Daubert* in his oral ruling, the court concluded that the judge's decision, when "read in totality," demonstrates that the judge relied upon the *Daubert* standard when issuing his ruling.[211] The court further held:

> [W]e all understand that oral rulings are not as formalistic, definitive, and specific as written ones. Trial judges need only follow (i.e., adhere to) *Daubert* when making a Rule 702 determination, . . . they are not required to recite the *Daubert* standard as though it were some magical incantation.[212]

In upholding the trial court, the Seventh Circuit reaffirmed the rule that an expert's qualifications may very well bear upon the scientific validity of the expert's testimony.[213] The court concluded that Lobodzinski, a mechanical engineer, did not possess the requisite qualifications to render an opinion as to the feasibility of installing a fixed-conveyor materials handling system or other plant reconfiguration alternatives.[214]

In *Lytle v. Ford Motor Co.*,[215] the Indiana Court of Appeals likewise addressed the application of *Daubert.* The *Lytle* court clarified when *Daubert* should be utilized to assess the admissibility of expert evidence in Indiana state courts.[216]

In *Lytle*, the court reviewed a trial court's entry of summary judgment in favor of Ford based upon, inter alia, the plaintiff's lack of competent expert evidence on causation.[217] The court noted that "[t]he admissibility of an expert's

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207. *Id*. (quoting Bradley v. Brown, 42 F.3d 434, 437 (7th Cir. 1994) (other citations omitted) (alteration in original)).

208. *Id*. (quoting United States v. Vitek Supply Corp., 144 F.3d 476, 485 (7th Cir. 1998) (other citations omitted)).

209. *Id.* (quoting *Vitek Supply*, 144 F.3d at 485 (other citations omitted)).

210. *Id*. at 516.

211. *Id*. at 517-18.

212. *Id* at 518 (citations omitted).

213. *Id*. (citations omitted).

214. *Id*. at 519.

215. 696 N.E.2d 465 (Ind. Ct. App. 1998).

216. *Id.*

217. *Id.* at 466-67.

testimony is governed by [Indiana Rule of Evidence] 702."[218] Accordingly,

> where an expert's testimony is based upon the expert's skill or experience rather than on the application of scientific principles, the proponent of the testimony must only demonstrate that the subject matter is related to some field beyond the knowledge of lay persons and the witness possesses sufficient skill, knowledge or experience in the field to assist the trier of fact to understand the evidence or to determine a fact in issue.[219]

On the other hand, "when the expert's testimony is based upon scientific principles, the proponent of the testimony must also establish that the scientific principles upon which the testimony rests are reliable."[220] Thus, according to *Lytle*, the admissibility standard enunciated in *Daubert* applies only to expert testimony based upon scientific principles.[221]

In *Lytle*, plaintiffs presented experts who testified that the plaintiffs' seat belt both inadvertently and inertially released.[222] The expert opinion regarding inadvertent release was based upon the expert's observations of the buckle and his observations of the configuration of the buckles.[223] The trial court excluded the expert opinion concerning inadvertent release because the testimony did not appear "scientifically based" and there was an insufficient "scientific foundation."[224] On appeal, the Indiana Court of Appeals noted that the expert's testimony was based upon his observations and his knowledge and experience rather than any scientific principles.[225] Therefore, proof of scientific reliability was not required.[226] Nonetheless, the court of appeals upheld the trial court decision excluding the expert evidence because plaintiffs failed to demonstrate that the expert possessed the requisite skill, knowledge, or experience that would

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218. *Id.* at 469. Indiana Rule of Evidence 702 provides:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

IND. R. EVID. 702.

219. *Lytle*, 696 N.E.2d at 469-70 (citing IND. R. EVID. 702(a); Corbin v. State, 563 N.E.2d 86, 92-93 (Ind. 1990)).

220. *Id.* at 470 (citing IND. R. EVID. 702(b)).

221. *Id.*

222. *Id.*

223. *See id.*

224. *Id.*

225. *Id*.

226. *See id*. (citation omitted).

assist the trier of fact in understanding the evidence.[227]

Plaintiffs' expert opinion concerning inertial release was based upon pendulum tests performed in which the experts were able to cause the buckle in question to inertially release by hitting the back of it with a hand or a hammer.[228] The court of appeals concluded that these opinions were based upon "complex scientific principles" and, thus, must have been shown to be scientifically reliable.[229] Because the tests failed to take into consideration web tension, among other things, the Indiana Court of Appeals concluded that they were properly excluded as scientifically unreliable.[230]

227. *Id*. at 470-71.

228. *See id.* at 471.

229. *Id*.

230. *Id*.