SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 1999 survey period[1] produced some interesting and informative decisions in cases involving Indiana product liability law.[2] Cases decided during the survey period answer some questions and raise many new ones with respect to Indiana product liability law.

This Article does not attempt to provide a survey of all cases applying Indiana product liability law decided during the survey period. Rather, it addresses selected cases that are representative of the seminal product liability issues that courts applying Indiana law have handled during the survey period.[3] The Article also provides some background information about the Indiana Product Liability Act ("IPLA") where appropriate.

I. CASES INTERPRETING STATUTORY DEFINITIONS

All claims that users or consumers[4] file in Indiana against manufacturers[5] and

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1. The survey period for this Article is October 1, 1998 to September 30, 1999.

2. Although many commentators and courts use the term "products liability" when referring to actions alleging damages as a result of defective and/or unreasonably dangerous consumer products, the applicable Indiana statutes refer to the term "product liability" (no "s"). This survey will follow the lead of the Indiana General Assembly and will likewise employ the term "product liability."

3. Some product liability cases that the Article does not treat in-depth include: *Clark v. Takata Corp.*, 192 F.3d 750 (7th Cir. 1998) (applying Kansas law); *Comer v. American Electric Power*, 63 F. Supp.2d 927 (N.D. Ind. 1999) (fire damage to home resulting from voltage surge caused by "loose neutral" connection on transformer); *Menges v. Depuy Motech, Inc.*, 61 F. Supp.2d 817 (N.D. Ind. 1999) (applying Wisconsin law); *Paper Manufacturers Co. v. Rescuers, Inc.*, 60 F. Supp.2d 869 (N.D. Ind. 1999) (holding that summary judgment was precluded in a case involving a third party claim against company that manufactured ink used in packaging for bone-cement powder because of factual questions regarding the manufacturer's knowledge of the ink's potential to cause the harm suffered, the adequacy of its warning, and whether plaintiff suffered physical harm); and *Precision Screen Machine, Inc. v. Hixon*, 711 N.E.2d 68 (Ind. Ct. App. 1999) (propriety of damage award in workplace injury product liability claim).

4. For purposes of application 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

sellers[6] for physical harm[7] caused by a product[8] are statutory in nature. The IPLA governs all such claims "regardless of the substantive legal theory or theories upon which the action is brought."[9] In 1995, the Indiana General Assembly enacted some rather sweeping revisions to the IPLA as part of what many have called "tort reform" legislation. Among the more significant changes include the incorporation of negligence principles into statutory claims pursuant to the IPLA in cases in which claimants base their theory of liability upon either defective design or inadequate warnings.[10] Traditional "strict liability" remains only in cases in which the theory of liability is based upon a manufacturing defect.[11] The 1995 amendments also limited actions against sellers,[12] more specifically defined the circumstances under which a distributor or seller could be deemed a manufacturer,[13] converted the traditional "state of the art" defense into a rebuttable presumption,[14] and injected comparative fault principles into

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product during its reasonably expected use." IND. CODE § 34-6-2-29 (1998). "User" has the same meaning as "consumer." *Id.* § 34-6-2-147.

5. For purposes of application 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." *Id.* § 34-6-2-77. "Manufacturer" also 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." *Id.* § 34-6-2-77(a).

6. For purposes of application of the IPLA, "seller" means "a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

7. For purposes of application 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." *Id.* § 34-6-2-105. It does not include "gradually evolving damage to property or economic losses from such damage." *Id.*

8. For purposes of application of the IPLA, "product" means "any item or good that is personalty at the time it is conveyed by the seller to another party." *Id.* § 34-6-2-114. 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." *Id.*

9. *Id.* § 34-20-1-1.

10. *See id.* § 34-20-2-2.

11. *See id.* The editors of Burns Indiana Statutes Annotated have included a title that could be misleading to their readers. The short title the editors have chosen for section 34-20-2-2 of the Indiana Code is "Strict Liability—Design Defect." The juxtaposition of the terms in that title might cause a reader to incorrectly assume that the statute provides for strict liability in design defect cases.

12. *See id.* § 34-20-2-3.

13. *See id.* § 34-20-2-4.

14. *Id.* § 34-20-5-1. The presumption is that the product causing the physical harm is not

product liability cases.[15]

As such, cases interpreting the IPLA are of the utmost importance. The cases that follow are a sampling of those decided during the survey period that define and interpret IPLA terms.

A. User or Consumer

In *Estate of Shebel v. Yaskawa Electric America, Inc.*,[16] the Indiana Supreme Court addressed the issue of who qualifies as a "user or consumer" for purposes of applying the ten-year product liability statute of repose. The court ultimately held that a "user or consumer" under the IPLA includes a distributor who uses the product extensively for demonstration purposes and that the ten year statute of limitations begins with delivery for such a use.[17]

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defective and that the product's manufacturer is not negligent. The IPLA entitles a manufacturer or seller to such a presumption if,

> before the sale by the manufacturer, the product: (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; and (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

Id.

15. The 1995 amendments changed Indiana law with respect to fault allocation and distribution in product liability cases. The Indiana General Assembly made it clear that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to section 34-20-8-1 of the Indiana Code, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant. *See id.* § 34-20-7-1.

The 1995 amendments now require the trier of fact to compare the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to the cause of harm. *See id.* § 34-20-8-1(a). The statute requires that the trier of fact compare such fault "in accordance with IC 34-57-2-7, IC 34-57-2-8, or IC 34-57-2-9." *Id.* Those references appear to be incorrect cross-references. Chapter 51 of Title 34 contains Indiana's Comparative Fault Act. Sections 34-51-2-7 through –9 of the Indiana Code are, therefore, most likely the statutory provisions to which the statute intends to refer. 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." *Id.* § 34-20-8-1(b).

Practitioners also should recognize that the definition of "fault" for purposes of the IPLA is not the same as the definition of "fault" applicable in actions governed by the Comparative Fault Act. *Cf. id.* § 34-6-2-45(a); *id.* § 34-6-2-45(b). For purposes of the IPLA, the definition of "fault" does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages," *id.*, which is included in the Comparative Fault Act's definition of fault. *See id.*

16. 713 N.E.2d 275 (Ind. 1999).

17. *Id.* at 276.

In 1992, a piece of a computer-controlled lathe struck Shebel in the chest, killing him.[18] Shebel's estate filed a product liability action against the lathe manufacturer and an American affiliate of the company that manufactured the lathe's computer controller. The lathe involved in the case has an interesting history. Its manufacturer sold it to a trading company in Japan, which, in turn, sold the lathe to Yamazen, USA, Inc., its American subsidiary. Yamazen received the lathe on March 5, 1981.[19] Yamazen used the lathe at trade shows to make manufactured parts. In 1982, Yamazen sold the lathe to a company that used it as a "demo machine" for about a year before returning it to Yamazen.[20] Yamazen then sold the lathe to Aegis Sales and Engineering, Inc., which received it in January 1983. Shebel's employer ultimately purchased the lathe from the company that purchased it from Aegis in 1990.[21]

The trial court held that, as a matter of law, Yamazen was a "user or consumer" of the lathe, and that the uncontroverted facts established that Shebel's injury occurred more than ten years after the lathe was delivered to Yamazen.[22] Accordingly, the trial court entered summary judgment for both defendants based upon the statute of repose. The court of appeals reversed the trial court, holding that, as a matter of law, Yamazen was a "seller" and not a "user or consumer."[23] The Indiana Supreme Court granted transfer and affirmed the trial court's decision.[24]

The supreme court recognized the threshold question as whether Yamazen, which received the lathe in March 1981, was a "user or consumer."[25] After citing the product liability statute of repose and its applicable ten-year limit, the court explained the utility and underlying policy justifications for the existence of a statute of repose in product liability cases. Ultimately, the court reaffirmed the principle that the wisdom of the policy underlying a product liability statute of repose is for the legislature.[26]

The *Shebel* court next recognized that the starting point for the ten-year product liability statute of repose is the "delivery to the initial user or consumer"[27] and thereafter quoted the statutory definition of "user or consumer."[28] After doing so, the court followed prior Indiana cases in

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18. *See id.* at 277.

19. *See id.*

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *See id.*

25. *Id.* at 278.

26. *See Estate of Shebel*, 713 N.E.2d at 278 (citing Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 212 (Ind. 1981)).

27. *Id.*

28. Section 33-1-1.5-2 of the Indiana Code defined "user or consumer" as "a purchaser, any individual who users or consumes the product, or 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 any

concluding that "user or consumer" does not include one who merely "acquires and resells,"[29] and that whether a particular person or entity is a "user or consumer" is "a purely legal question."[30]

The court disagreed with the estate's contention that Yamazen could not be a "user or consumer" because it was a seller.[31] Although the court recognized that Yamazen sold lathes and was "generally a distributor,"[32] it also determined that Yamazen was a user or consumer of the *particular lathe* at issue.[33] While isolated or incidental use may not be sufficient to render a distributor a user, the undisputed facts before it convinced the court that Yamazen had "repeated and extensive use of the lathe."[34] The designated facts demonstrated that Yamazen used the lathe to manufacture parts at trade shows, which the court concluded was not a case of possession only for resale or for assembling its component parts.[35] The court also noted that Yamazen used the lathe for its intended end use--the production of machined parts.[36] Accordingly, the court concluded that Yamazen was, as a matter of law, the "initial user or consumer" of the lathe.[37]

Because Yamazen was the "initial user or consumer" of the lathe and because Yamazen received the lathe as the initial user or consumer in March 1981, the

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bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use."

29. *Estate of Shebel*, 713 N.E.2d at 278 (citing Thiele v. Faygo Beverage, Inc., 489 N.E.2d 562 (Ind. Ct. App. 1986); Whittaker v. Federal Cartridge Corp., 466 N.E.2d 480 (Ind. Ct. App. 1984)).

30. *Id.* (citing Estate of Shebel v. Yaskawa Elec. Am., Inc., 676 N.E.2d 1091, 1092 (Ind. Ct. App. 1997), *rev'd*, 713 N.E.2d at 275 (Ind. 1999); State *ex rel.* Paynter v. Marion County Super. Ct., 344 N.E.2d 846, 849 (1976)).

31. *Id.* at 279.

32. *Id.*

33. *See id.*

34. *Id.* Evidence revealed that before being sold to Aegis, the lathe "had been run in 'hundreds at least and possibly in the thousands' of hours." *Id.*

35. *See id.*

36. *See id.*

37. *Id.* In reaching its decision about whether Yamazen was a "user or consumer," the court also addressed the estate's attempts to utilize testimony of an expert witness in an attempt to create a fact issue sufficient to defeat the defendants' motions for summary judgment. *See id.* at 280. The witness opined that Aegis, not Yamazen, was the first user or consumer of the lathe. *See id.* The witness also pointed out that Aegis accepted the lathe on January 12, 1983, that the machine had not previously been used to manufacture parts used in any manufacturing process or commerce before delivery to Aegis, that Aegis received a new warranty, and that some documentation identified the lathe as a 1983 (not a 1980) model. *See id.* The court determined that the expert's opinion about who was the first user or consumer amounted to an inadmissible legal conclusion pursuant to Rule 704(b) of the Indiana Rules of Evidence, and that the other points raised were irrelevant. *See id.* According to the court, the critical question is whether the machine was "used," not what happened to the products it made or whether a seller was willing to issue a warranty for a product as a "new" model. *Id.* at 280.

1992 accident involving Shebel took place more than ten years after delivery to Yamazen.[38] Thus, the court held that the product liability statute of repose barred the Estate's claims.[39]

In *Butler v. City of Peru*,[40] the court of appeals held that a maintenance worker was not a "consumer" of electricity such that his estate could assert a viable claim.[41] James Butler was a maintenance worker for the Peru Community School Corporation. He was killed when he came into contact with a high voltage electrical line while attempting to repair an electrical problem at the baseball field at Peru High School.[42] Butler's estate sued the City of Peru and Peru Municipal Utilities. The trial court granted summary judgment to both defendants and the estate appealed on several grounds,[43] the first of which was whether the IPLA applied.

On appeal, the *Butler* court rather narrowly phrased the product liability issue as whether the IPLA applies when an electrical utility customer's employee is injured on the customer's premises by a defect in an electrical installation the utility did not perform.[44] The trial court determined that the IPLA does not apply because James Butler was not a "consumer" of electricity. The court of appeals agreed.

In doing so, the *Butler* court was quick to point out that electricity can be a "product" within the meaning of the IPLA,[45] and that determining whether a plaintiff is a "consumer" within the meaning of the IPLA is a "pure question of law."[46] According to the *Butler* court,

> of all of the potential plaintiffs who might be injured by a defective product, those that have been granted the protection of the [IPLA,] has been doubly limited to (1) users and consumers (2) whom the seller should reasonably foresee as being subject to the harm caused by the product's defective condition.[47]

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38. *See id.*

39. *See id.*

40. 714 N.E.2d 264 (Ind. Ct. App. 1999), *trans. granted*, 52A02-9803-CV-269, 2000 Ind. LEXIS 175 (Ind. Feb. 17, 2000).

41. *Id.* at 272.

42. *See id.* at 265.

43. The other issues involved whether the utility company had a duty to insulate the high voltage line at issue, whether it had a duty to protect a customer's employee from a dangerous condition in the electrical work located on the customer's property, whether it gratuitously assumed a duty to protect persons from dangerous conditions, and, finally, whether James Butler was contributorily negligent as a matter of law. *See id.* at 265-66.

44. *See id.* at 265.

45. *Id.* at 267 (citing Public Serv. of Ind., Inc. v. Nichols, 494 N.E.2d 349 (Ind. Ct. App. 1986)).

46. *Id.* (citing Thiele v. Faygo Beverage, Inc., 489 N.E.2d 562 (Ind. Ct. App. 1986).

47. *Id.*

The *Butler* court next analyzed section 34-6-2-29 of the Indiana Code.[48] The court reasoned that James Butler was not a purchaser of the product, that he did not consume the product, that he did not possess it while acting on behalf of an injured party, and that he was not a bystander.[49] Thus, the court determined that the only definition of consumer that conceivably could apply to James is "any individual who . . . uses the product."[50]

Citing *Thiele v. Faygo Beverage, Inc.*,[51] the *Butler* court reiterated that the legislature intended "user or consumer" "to characterize those who might foreseeably be harmed by a product *at or after* the point of its retail sale or equivalent transaction with a member of the consuming public."[52] In light of *Thiele*, the court alternately determined that James Butler was not a "user" of the electricity product, and that the trial court did not err in determining that the IPLA does not apply.[53]

B. Products or Services

In *Marsh v. Dixon*,[54] the court of appeals addressed whether an amusement ride is a product or a service for purposes of the IPLA. In *Marsh*, plaintiff Jason Marsh injured his ankle when he fell from a wind tunnel ride that simulated the experience of free fall. The ride projected columns of air to levitate a trampoline upon which patrons rode.[55]

Marsh and his wife sued Kirk Dixon, the individual who constructed the ride, and his company, Dyna Soar Aerobatics, Inc. (collectively, "Dyna Soar"). The Marshes asserted both negligence and product liability claims.[56] The trial court entered summary judgment in favor of Dyna Soar. On appeal, the Marshes raised two issues for review. The first issue involved the trial court's application of an exculpatory clause to bar the Marshes' negligence claims.[57] The second issue focused upon the propriety of the trial court's grant of summary judgment with respect to the Marshes' product liability claim.[58] The court of appeals reversed

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48. *See supra* note 4 (providing the definition of "consumer" for IPLA application); *see also* IND. CODE § 34-6-2-29 (West 1998).

49. *See Butler*, 714 N.E.2d at 268.

50. *Id.*

51. *Thiele*, 489 N.E.2d at 562.

52. *Butler*, 714 N.E.2d at 268 (citing *Thiele*, 489 N.E.2d at 586).

53. *Id.*

54. 707 N.E.2d 998 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 302 (Ind. 1999).

55. *See id.* at 999.

56. The Marshes' cause of action accrued when Jason Marsh was injured on October 9, 1994. Because their cause of action accrued before June 30, 1995, the 1995 amendments to the IPLA that incorporate negligence into Indiana's statutory cause of action for physical harm caused by defective products did not apply. Thus, pursuit of both a common law "negligence" claim and a statute-based "products" claim was then appropriate.

57. *See id.* at 1000.

58. *See id.* at 1001.

the trial court's decision to apply the exculpatory clause[59] and affirmed its decision to grant summary judgment on the product liability claim.

The court of appeals, reviewing the trial court's grant of summary judgment on the product liability claim, first recognized that Dyna Soar had to be deemed a "seller of a product" to be subject to liability under the IPLA.[60] The version of the IPLA at issue defined "seller" as "a person engaged in the business of selling or leasing a product for resale, use, or consumption."[61] The IPLA defines product as "any item or good that is personalty at the time it is conveyed by the seller to another party. It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product."[62]

The Marshes argued that Dixon both created a product (the machine) *and* provided a service (the wind tunnel ride).[63] They further argued that their claim should not be barred merely because a service also was provided. The court of appeals disagreed, reasoning that

> [T]he transaction between Marsh and Dyna Soar wholly involved a service. By purchasing a ticket from Dyna Soar, Marsh received the limited right to ride the Dyna Soar machine. He did not receive an interest in any property. In fact, Dyna Soar retained all rights to operate and control the machine in question.[64]

Accordingly, the *Marsh* court concluded that the trial court did not err when it entered summary judgment against the Marshes with respect to their product liability claim.[65]

In *Lenhardt Tool & Die Co. v. Lumpe*,[66] the court of appeals also examined the IPLA's requirement that valid product liability actions must involve the sale of products as opposed to the provision of services. Lumpe worked as a "melter"

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59. The *Marsh* court agreed with the Marshes that the release Jason signed exculpating Dyna Soar was not sufficient to release Dyna Soar for its own negligence. *See id.* at 1000-01.

60. *Id.*

61. *Id.* at 1001-02. The statute then applicable was section 33-1-1.5-2(5) of the Indiana Code, which is now recodified as section 34-6-2-136 of the Indiana Code.

62. *Marsh*, 707 N.E.2d at 1002. The statute then applicable was section 33-1-1.5-2(6) of the Indiana Code, which is now recodified as section 34-6-2-114 of the Indiana Code.

63. *See Marsh*, 707 N.E.2d at 1002.

64. *Id.* In so doing, the court of appeals found *Hill v. Rueth-Riley Construction Co.*, 670 N.E.2d 940 (Ind. Ct. App. 1996), persuasive. In *Hill*, the defendants removed and reset guardrails to facilitate the resurfacing of U.S. Highway 31. The plaintiff struck one of the guardrails and brought suit against the defendants pursuant to the IPLA. *See id.* at 942. The court held that the contract between the Indiana Department of Transportation and the plaintiffs was predominantly a contract for services "[e]ven if it were true that 31 new concrete plugs were installed and some rusted rails replaced, the [plaintiffs] have presented no evidence that this contract was not 'for the most part' about the service of resurfacing the roadway." *Marsh*, 707 N.E.2d at 1002 (quoting *Hill*, 670 N.E.2d at 943).

65. *See Marsh*, 707 N.E.2d at 1002.

66. 703 N.E.2d 1079 (Ind. Ct. App. 1999), *trans. denied*, 722 N.E.2d 824 (Ind. 2000).

and a "pin man" for Olin Brass, a company that manufactures brass bars.[67] Part of the manufacturing process involves pouring molten metal into a mold. On August 22, 1992, Olin was injured in an explosion at Olin.[68] According to the court, Lenhardt manufactured some of the molds used by Olin at the time of the explosion.[69]

Lumpe filed a claim against Lenhardt, alleging negligence and strict liability.[70] Because no one could identify or locate the molds and plugs used at the time of the accident, Lenhardt filed a motion for summary judgment with the trial court on the theory that Lumpe could not prove that Lenhardt either negligently manufactured the molds at issue or manufactured the molds in such a manner as to be dangerously defective.[71] The trial court denied Lenhardt's motion and Lenhardt appealed.[72]

After concluding that the trial court did not commit reversible error in applying Indiana's summary judgment standard with respect to Lumpe's negligence claim,[73] the *Lenhardt* court turned its attention to the merits of Lenhardt's motion for summary judgment concerning Lumpe's strict liability claim.[74] Lenhardt argued that the IPLA did not apply because it provides services, not products, and because it is not a "seller."[75]

The court first recognized that the IPLA does not apply to transactions that involve "wholly or predominantly the sale of a service rather than a product."[76] However, after an analysis of three cases, *Denu v. Western Gear Corp.*,[77] *Whitaker v. T.J. Snow Co.*,[78] and *Rotation Products Corp. v. Department of State Revenue*,[79] the court determined that any entity is a manufacturer and provider of products under the IPLA if it reconditions, alters, or modifies a product or raw material to the extent that a new product has been introduced into the stream of commerce.[80] The court also determined that when a product exists before the work performed, the extent of the repair or work performed on the product

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67. *Id.* at 1081.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. In doing so, the *Lehnardt* case may have created something of a procedural showdown in the summary judgment context. *See infra* notes 169-205 and accompanying text.

74. Lumpe's cause of action on August 22, 1992, is, of course, before the July 1, 1995 accrual date necessary for application of the 1995 amendments to the IPLA. Accordingly, Lumpe was able to bring both statutory strict liability claims and separate negligence claims regardless of whether the theory was manufacturing, design, or warning defect.

75. *See Lenhardt Tool & Die Co.*, 703 N.E.2d at 1084.

76. *Id.* at 1085 (citing IND. CODE § 33-1-1.5-2(6) (1998)).

77. 581 F. Supp. 7, 8 (S.D. Ind. 1983).

78. 953 F. Supp. 1034, 1039-45 (S.D. Ind. 1997), *aff'd*, 151 F.3d 661 (7th Cir. 1998).

79. 690 N.E.2d 795, 801 (Ind. Tax Ct. 1998).

80. *See Lenhardt Tool & Die Co.*, 703 N.E.2d at 1085.

determines whether an entity has created a new product or merely serviced an existing product.[81]

The *Lenhardt* court pointed out that Olin shipped solid blocks of metal to Lenhardt with drawings and specifications. Lenhardt then machined the block of metal into molds per the designs found in the drawings and specifications. As such, the court concluded that Lehnardt transformed the metal block into a new product that was substantially different from the raw material used and, therefore, it has provided products, not merely services.[82] Moreover, the court concluded that the repair of damaged molds could be viewed as either the creation of a new product or the service of repairing the original product, depending upon the degree of work needed.[83]

Finally, because the court determined that Lenhardt created new products when it made the molds, and possibly when it repaired the molds, the court concluded that Lenhardt was a manufacturer of molds.[84] As such, Lenhardt was, by definition, a "seller" for purposes of the application of the IPLA.[85]

C. Physical Harm

Miceli v. Ansell, Inc.[86] is case in which a husband and a wife sued a condom manufacturer after the wife became pregnant. The plaintiffs contended that the pregnancy resulted from a hole in the condom.[87] They filed claims against the condom manufacturer based upon strict liability, negligent design, manufacture, packaging, and quality control, and breach of warranty of merchantability and fitness for a particular purpose.[88]

The condom manufacturer filed a motion to dismiss, arguing that the complaint failed to "allege any 'physical harm' to Plaintiffs and because the condom, even if defective, was not unreasonably dangerous."[89] In its written opinion denying the motion, the court addressed both arguments.

With respect to the "strict liability" claim,[90] the court recognized that

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81. *See id.*

82. *See id.*

83. *See id.* at 1085-86.

84. *See id.* at 1086.

85. *Id.*

86. 23 F. Supp.2d 929 (N.D. Ind. 1998).

87. *See id.* at 930.

88. *See id.* at 931.

89. *Id.* at 932.

90. Plaintiffs allegedly purchased and used the condom at issue on May 11, 1997, which means that the plaintiffs' cause of action "accrued" after June 30, 1995. As such, the post-1995 amendments to the IPLA should apply. Section 34-20-2-1 of the Indiana Code makes a "strict liability" claim available only for manufacturing defects because

> in 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

"physical harm," according to section 34-6-2-105 of the Indiana Code, means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."[91] In an effort to determine whether pregnancy constitutes a "physical harm" as defined by the IPLA, the court examined Indiana state court opinions. In doing so, the court cited both *Garrison v. Foy*[92] and *Cowe v. Forum Group, Inc.*,[93] for the proposition that Indiana courts, in other contexts, recognize "wrongful pregnancy" claims.[94] Thus, the court concluded that "[b]y recognizing the claim of wrongful pregnancy, Indiana state courts have decided that in certain cases, pregnancy may be considered a harm or damage done to a plaintiff."[95] More specifically, the court found that "pregnancy may constitute a 'harm' where efforts to prevent conception fail as the result of the defendant, whether he be a doctor, a pharmacist, or a contraceptive device manufacturer."[96]

The manufacturer also argued that the condom, even if defective, was not unreasonably dangerous because the sole proximate cause of pregnancy is the union of the sperm and egg.[97] The court disagreed, first pointing out that Indiana courts recognize claims for wrongful pregnancy in cases where plaintiffs allege that the doctor's or pharmacist's negligence proximately caused a pregnancy by failing to prevent the union of sperm and egg.[98] Accordingly, the court refused to find the claims foreclosed as a matter of law in the context of a motion to dismiss.[99] Whether the condom was, in fact, unreasonably dangerous and/or the proximate cause of the pregnancy are questions to be considered on the merits "if and when the parties file motions for summary judgment."[100]

II. DEFENSES AND COMPARATIVE FAULT ISSUES

The IPLA includes specifically enumerated defenses to product liability actions in Indiana.[101] Practitioners know these defenses as the incurred risk

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exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

IND. CODE § 34-20-2-1 (West 1998). The court's opinion does not recognize that distinction, although the "elements" necessary to prove a "strict liability" manufacturing defect claim appear to be appropriate. *Miceli*, 23 F. Supp.2d at 932.

91. *Miceli*, 23 F. Supp.2d at 932.
92. 486 N.E.2d 5 (Ind. Ct. App. 1985).
93. 575 N.E.2d 630 (Ind. 1991).
94. *Miceli*, 23 F. Supp.2d at 932 (citations omitted).
95. *Id.* at 933.
96. *Id.*
97. *See id.*
98. *See id.* at 934.
99. *See id.*
100. *Id.*
101. *See* IND. CODE § 34-20-6-1 (1998).

defense,[102] the misuse defense,[103] and the modification or alteration defense.[104] A handful of cases decided during the survey period help to illustrate how Indiana courts apply and interpret these defenses.

In *Hopper v. Carey*,[105] Bernard Hopper and his son were injured when the fire truck in which they were riding was involved in an accident with another truck. The fire truck was equipped with seat belts, but none of the occupants were wearing them at the time of the accident.[106] The Hoppers'[107] complaint alleged negligence against Carey, a contractor who performed paving work on the road's shoulder, and the county highway department. The Hoppers also asserted a strict liability claim against the manufacturer of the fire truck, S & S Fire Apparatus Co.[108]

One of the defendants filed a motion in limine seeking an order that evidence of the Hoppers' failure to wear seat belts was admissible to demonstrate their fault. The trial court granted the motion in limine and certified the order for interlocutory appeal.[109]

The court of appeals separately addressed the issue of the Hoppers' "fault" for failure to wear seat belts, first analyzing claims under the Comparative Fault Act,[110] then claims against the highway department governed by contributory negligence,[111] and, finally, product liability claims against S & S.[112]

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102. "It 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." *Id.* § 34-20-6-3.

103. "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." *Id.* § 34-20-6-4.

104. Indiana Code section 34-20-6-5 states:

> 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.

Id. § 34-20-6-5.

105. 716 N.E.2d 566 (Ind. Ct. App. 1999), *trans. denied*, No. 72A01-9809-CV-330, 2000 Ind. LEXIS 270 (Ind. Mar. 23, 2000).

106. *See id.* at 569.

107. Bernard and Rettie Hopper brought claims individually and on behalf of their minor son, George. *See id.*

108. *See id.*

109. *See id.* at 569-70.

110. *Id.* at 573.

111. Common law principles of contributory negligence governed the Hoppers' negligence claims against the highway department. *See id.* at 573-75. Indiana's Comparative Fault Act governed the Hoppers' negligence claims against Carey. *See id.* at 570, 575-76. The court of appeals ultimately determined that the "seatbelt defense" is unavailable to all three defendants in a negligence context regardless of whether the claims are governed by the Comparative Fault Act

With respect to the product liability claims against S & S, the *Hopper* court began by recognizing that IPLA claims are subject to specifically enumerated defenses, including the "incurred risk" defense embodied in section 34-20-6-3 of the Indiana Code.[113] The *Hopper* court also pointed out that "even 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 accepted [incurred] the risk."[114]

Because the Hoppers did not adequately specify the basis of their claim, the court 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.[115] Without such information, the court wrote that it was unable to determine the applicability of the incurred risk defense.[116] The *Hopper* court went on, however, to note in potentially important dicta that evidence of seat belt usage is only admissible when a plaintiff has actual knowledge of a specific risk against which he fails to protect himself.[117] In other potentially important dicta, the *Hopper* court added:

> [I]f Hopper is complaining of the absence of a structure designed for the safety of passengers in the event of a roll-over, evidence that seatbelts were adequate safety devices in the absence of such a structure would be valid evidence to negate Hopper's claim of causation. . . . In short, the lack of a safety device cannot be the cause of the injuries if other adequate but unused safety devices were available to the plaintiff.[118]

Because the record did not disclose the Hoppers' specific grounds for a product liability action, the court of appeals remanded to the trial court for further findings.[119]

In another interesting case, *Cole v. Lantis Corp.*,[120] Cole's job required him to load cargo into aircraft. He worked several feet off the ground atop an elevated platform known as a "K-Loader."[121] When positioned for loading, there was a gap of approximately eighteen inches between the edge of the K-Loader's platform and the edge of the aircraft cargo bay. The gap was necessary to prevent the K-Loader from damaging an aircraft's fuselage.

Cole sustained serious injuries when he slipped through the gap and fell approximately fifteen feet to the ground. He filed suit against Lantis, the

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or common law contributory fault principles. *Id.* at 576.

112. *See id.*

113. *Id.*

114. *Id.* (quoting Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 441 (Ind. 1990)).

115. *See id.*

116. *See id.*

117. *See id.*

118. *Id.* (citations omitted).

119. *See id.*

120. 714 N.E.2d 194 (Ind. Ct. App. 1999).

121. *Id.* at 197.

manufacturer of the K-Loader.[122] Lantis filed a motion for summary judgment. Cole opposed the motion by presenting the affidavit of a safety engineer who opined that the K-Loader was negligently designed and unreasonably dangerous due to several defects.[123] In addition, Cole had used other Lantis K-Loaders that utilized wider platforms and had rails and platforms along the left and right sides. Cole also testified that the K-Loader from which he fell was not as safe as other K-Loaders because "there wasn't much of a rail or a platform to stand onto."[124]

Additional facts disclosed that Cole had observed the gap and appreciated the danger posed by it since his first day on the job.[125] He expressed concern regarding the danger to his supervisors, but no action was taken to alleviate the danger. Before the fall, Cole had worked without incident on the type of K-Loader at issue for more than a year.[126]

The trial court granted summary judgment to Lantis. On appeal, Lantis continued to argue that Cole was fully aware of the dangers posed by the gap and that the product was not unreasonably dangerous under the open and obvious rule.[127] Lantis also argued that because Cole had actual knowledge, understanding, and appreciation of the specific risk posed by the gap, the affirmative defense of incurred risk barred his claim.[128] The court of appeals disagreed, and reversed the trial court's grant of summary judgment.[129]

The court of appeals first determined that application of the open and obvious danger rule was a matter for the jury.[130] In doing so, however, the court recognized that, technically, Indiana courts have not traditionally applied the open and obvious "defense" to claims brought pursuant to the IPLA.[131] As the court explained, a defective condition must be hidden or concealed to be

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122. *See id.*

123. *See id.* The claimed defects were:

> 1) that the gap was too wide; 2) that the handrail was inadequate; 3) that there was insufficient work space on the platform; 4) that the instructions in the operating manual were inadequate; and 5) that there was no warning regarding the requirement that a bumper be near the aircraft to provide adequate protection against falling.

Id.

124. *Id.*

125. *See id.* at 198.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 200.

130. *See id.*

131. *Id.* (citing FMC Corp. v. Brown, 551 N.E.2d 444, 446 (Ind. 1988)). Indeed, the *Cole* court cites *FMC* for the proposition that "the open and obvious rule does not apply to strict liability claims under the Indiana Product Liability Act." *Cole*, 714 N.E.2d at 199 (citation omitted). *FMC* was, of course, decided before the 1995 amendments that grounded all product liability actions in the IPLA. When *FMC* was decided, claimants could assert both a valid common law negligence claim and a valid statutory "strict liability" claim. In light of the 1995 amendments, the IPLA no longer includes *only* strict liability claims. *See* IND. CODE § 34-20-2-2 (1998).

unreasonably dangerous. "Thus, whether a danger is open and obvious and whether the danger is hidden are two sides of the same coin."[132] Accordingly, the court recognized that evidence of the open and obvious nature of the danger, rather than being technically a defense, in reality "serves to negate a necessary element of the plaintiff's prima facie case that the defect was hidden."[133] As such, a majority of the appellate panel in *Cole* concluded that whether the K-Loader is unreasonably dangerous (or whether the open and obvious rule bars Cole's claim) is a question of fact that the jury must resolve.[134]

With respect to the incurred risk argument, the court was quick to point out that incurred risk is a defense to both strict liability and negligence claims and that it "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."[135] In the summary judgment context, 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.[136]

The majority in *Cole* cited Indiana decisions recognizing that the responsibilities and influences arising from workplace involvement can determine the voluntariness of an employee's actions.[137] Because Cole's job necessarily entailed moving containers across the gap and his apparent belief that he must somehow find a way to work around the known danger, the majority concluded that whether Cole voluntarily incurred the risk of falling through the gap is also a fact question for the jury's resolution.[138]

Judge Friedlander's dissenting opinion concludes that Lantis is entitled to summary judgment in light of the doctrine of incurred risk.[139] This dissent recognizes that the defense of incurred risk applies when the evidence establishes that the plaintiff knew and appreciated the danger caused by the alleged negligence, but nevertheless accepted the danger voluntarily.[140] With respect to the cases the majority cited concerning the role an employee's workplace plays

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132. *Cole*, 714 N.E.2d at 199 (citations omitted).

133. *Id.* (citations omitted).

134. *See id.* at 200. Among the facts sufficient to convince a majority of the appellate panel of the existence of a jury question were that Cole had safely moved containers over the gap for more than a year before the accident, that Cole had done so by stepping over it, and that there were no obvious or reasonable precautionary measures that Cole could have taken to reduce the risk of falling. *See id.* at 199.

135. *Id.* at 200 (citing Schooley v. Ingersoll Rand, Inc., 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* at 200-01 (Friedlander, J., dissenting).

140. *See id.* at 201. Judge Friedlander's dissent also appropriately recognizes that the defense of incurred risk applies to negligence claims brought under the IPLA. *See id.* That passage reveals an implicit understanding that the IPLA now governs certain negligence claims.

in the "voluntariness" of an employee's actions,[141] Judge Friedlander pointed out that the "influence" with which Indiana courts have been concerned stems from the employer/defendant and the "inducement" arising from the continuance of a business relationship or employment.[142] In Cole's case, Judge Friedlander wrote that Lantis did not have a business relationship with Cole and was, therefore, unable to exert any influence over Cole with regard to the risk posed by using the K-Loader.[143]

Judge Friedlander viewed the case as being similar to *Ferguson v. Modern Farm Systems, Inc.*,[144] where the court applied the incurred risk defense to bar a claim involving a worker whom the evidence revealed was familiar with the risks associated with using only one hand when climbing a ladder.[145] In Judge Friedlander's assessment, that Cole knew about the K-Loader's smaller platform and smaller rails, that he knew the handrails were not allowed to touch the aircraft, and that he knew that the gap was a dangerous condition, all demonstrated that Cole was aware of the specific risks posed by the allegedly dangerous condition of which he complained; thus, Cole voluntarily exposed himself to those risks without inducements or influence from Lantis.[146]

In another case involving product liability defenses, *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,[147] the court of appeals addressed the issues of misuse, modification, and alteration. The court also dealt with a jury instruction concerning the former "state of the art" defense, as well as an "accident proof" jury instruction.[148] The case involved strict liability and breach of warranty claims by the Indianapolis Athletic Club ("IAC") against Delfield Division of the Alco Standard Corporation ("Delfield") stemming from a fire at the IAC allegedly caused by a defect in the electric cord of a refrigerator that Delfield manufactured. Delfield pled the affirmative defenses of misuse, modification, and state of the art.[149] At trial, Delfield argued that a defect in the electrical outlet caused the fire, not a defect in the refrigerator's cord. After a lengthy jury trial, the jury found in favor of Delfield.[150]

IAC appealed, and the court of appeals affirmed. The relevant portion of IAC's appeal focuses upon three product liability issues: (1) "whether there was sufficient evidence to support the trial court's jury instruction regarding misuse, modification, and alteration"; (2) "whether the trial court properly instructed the jury regarding the 'state of the art' defense where the plaintiff's complaint

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141. Those cases are *Richardson v. Marrell's, Inc.*, 539 N.E.2d 485 (Ind. Ct. App. 1989) and *Meadowlark Farms, Inc. v. Warken*, 376 N.E.2d 122 (Ind. Ct. App. 1978).

142. *Cole*, 714 N.E.2d at 201 (Friedlander, J., dissenting).

143. *See id.*

144. 555 N.E.2d 1379 (Ind. Ct. App. 1990).

145. *See Cole*, 714 N.E.2d at 202 (Friedlander, J., dissenting).

146. *See id.*

147. 709 N.E.2d 1070 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 304 (Ind. 1999) (mem.).

148. *Id.* at 1072.

149. *See id.*

150. *See id.*

alleged a manufacturing defect"; and (3) "whether the trial court properly instructed the jury regarding 'accident-proof' products and manufacturer duty."[151]

With respect to the first issue, IAC did not argue that the misuse/modification jury instruction misstated the law; rather, it argued that there was no evidence introduced at trial to support the instruction.[152] In support of its contrary argument that such evidence existed, Delfield pointed to expert testimony that misuse of the electrical cord by the user is a common cause of fires, that moving the refrigerator could "have caused crimping of the cord," and that rodents could have caused the fire by chewing on the cord.[153]

The court disagreed with Delfield that the evidence was sufficient to justify a misuse/modification instruction.[154] The court wrote that there was no evidence that cord "crimping" ever occurred and, even assuming that moving the refrigerator could cause such "crimping," such action did not modify or alter the refrigerator from its original state, nor could it be considered a misuse.[155] Moreover, according to the court, Delfield reasonably could have foreseen that an IAC employee would move the refrigerator.[156] The court also determined that evidence of rodents chewing on the cord failed to support the instruction because there was no direct evidence on that point, only that rodents were in the general vicinity of the refrigerator.[157] Furthermore, even assuming rodents chewed on the cord, such an occurrence is not an action by a "person," which the IPLA requires.[158]

Although the court of appeals agreed with IAC that there was insufficient evidence to support the misuse/modification instruction, the court of appeals also determined that giving the instruction was not reversible error because it did not prejudice IAC.[159]

The *Indianapolis Athletic Club, Inc.* court next turned its attention to a "state of the art" instruction the trial court read to the jury. Specifically, IAC argued that giving a state of the art instruction is inconsistent with a claim that a

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151. *Id.*

152. The *Indianapolis Athletic Club, Inc.* court quoted sections 33-1-1.5-4(b)(2) and (b)(3) of the Indiana Code in acknowledging the existence of statutory defenses for misuse and modification/alteration. The misuse defense is now found at section 34-20-6-4 of the Indiana Code, and the modification/alteration defense is now found at section 34-20-6-5 of the Indiana Code. According to the *Indianapolis Athletic Club, Inc.* court, "[m]isuse of a product is a defense that completely bars a product liability claim as it is considered an intervening cause that relieves the manufacturer of liability where the intervening act could not have been reasonably foreseen by the manufacturer." *Id.*

153. *Id.* at 1073.

154. *See id.*

155. *Id.*

156. *See id.*

157. *See id.*

158. *Id.* (citing IND. CODE § 33-1-1.5-4(b)(2), -4(b)(3) (1998)).

159. *See id.*

manufacturing defect caused physical harm, which is a strict liability claim.[160] After a brief discussion of *Weller v. Mack Trucks, Inc.*,[161] and section 33-1-1.5-4(b) of the Indiana Code, the *Indianapolis Athletic Club, Inc.* court concluded that the state of the art defense applied to IAC's manufacturing defect claim, and was not restricted to design defect theories.[162]

Although the IPLA now provides that "state of the art" is no longer a defense in product liability cases,[163] the *Indianapolis Athletic Club* opinion should nevertheless be helpful for practitioners who are searching for some explanation about what "state of the art" means. After all, the court found that the instruction at issue correctly stated the law.[164] Practitioners also may read *Indianapolis Athletic Club* as confirmation that the "state of the art" presumption should apply in product liability law regardless of whether the underlying theories sound in strict liability (manufacturing defects) or negligence (design and warning defects).

The third product liability issue the *Indianapolis Athletic Club* court addressed involved the following instruction: "While a manufacturer is under no duty to produce accident-proof products, it is legally under a duty to design and build products that are reasonably fit and safe for the purpose for which they are intended."[165] IAC argued that the instruction was improper because it was tantamount to a "mere accident" instruction.[166] The court of appeals ultimately determined that giving the "accident-proof" instruction was not reversible error.[167] In doing so, however, the court cautioned trial courts that giving such an instruction tends to raise "problems and issues," and that such an instruction should "not be used in future cases."[168]

III. PRODUCT IDENTIFICATION IN THE SUMMARY JUDGMENT CONTEXT

Two cases decided during the survey period dealt with product identification

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160. *Id.* at 1074.

161. 570 N.E.2d 1341 (Ind. Ct. App. 1991).

162. *See Indianapolis Athletic Club, Inc.*, 709 N.E.2d at 1074.

163. *See id.* at 1074 n.1 ("The state of art defense has been abolished by Public Law 278-1995 and replaced by a rebuttable presumption on state of the art." (citing IND. CODE § 34-20-5-1 (1998)).

164. *See id.* at 1075.

165. *Id.*

166. "Under Indiana law, it is reversible error to instruct the jury that a plaintiff may not recover if his damages are the result of a 'mere' or 'pure' accident." *Id.* (quoting Weinand v. Johnson, 622 N.E.2d 1321, 1324 (Ind. Ct. App. 1993)). "This is true because of the danger of varying and ambiguous definitions and interpretations of the word 'accident.' The instruction is misleading because it suggests that the defendant is not liable for causing a 'mere accident' even though the defendant may have been negligent in causing the accident." *Id.* (quoting *Weinard*, 622 N.E.2d at 1324-25).

167. *Id.* at 1077.

168. *Id.*

and the quantum of evidence necessary to survive summary judgment. The appellate panels deciding the two cases appear to have applied Indiana's summary judgment standard differently.

In *Owens Corning Fiberglas Corp. v. Cobb*,[169] the Indiana Court of Appeals reversed the trial court's denial of summary judgment to defendant Owens Corning Fiberglas Corp. ("OC") in an asbestos product liability case. Cobb, a former pipe fitter, sued more than thirty manufacturers or distributors of products allegedly containing asbestos.[170] As the case progressed toward trial, Cobb settled with some defendants and entered into stipulated dismissals with others. Cobb and several defendants, including OC, filed cross-motions for summary judgment.[171] OC's motion for summary judgment argued that Cobb failed to provide any evidence that he was exposed to asbestos-containing products manufactured or distributed by OC. The trial court denied without comment OC's motion for summary judgment.[172]

After suffering an adverse judgment at trial, OC filed two motions to correct error seeking a reduction in the damages awarded.[173] In response to the motions to correct error, the trial court reduced the punitive damages award to three times the compensatory award, but denied all other motions.[174] OC appealed the trial court's denial of summary judgment with respect to its product identification motion and the trial court's grant of partial summary judgment to Cobb with respect to its non-party affirmative defense.[175] The Indiana Court of Appeals reversed, remanding the case to the trial court with instructions to vacate the

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169. 714 N.E.2d 295 (Ind. Ct. App. 1999), *trans. granted*, No. 49A04-9801-CV-46, 2000 Ind. LEXIS 60 (Jan. 19, 2000).

170. *See id.* at 297.

171. Cobb's motion for summary judgment asserted that OC had not presented sufficient evidence to support its affirmative defenses, including a non-party defense. *See id.* at 298.

172. *See id.* The trial court also granted Cobb's motion for partial summary judgment regarding OC's affirmative defenses, except for the defense of contributory fault. *See id.*

173. OC's first motion to correct errors argued that the punitive damages award was excessive and subject to the statutory limitations contained in section 34-4-34-4 of the Indiana Code. OC's second motion requested a new trial on the issue of damages or a remittitur. *See id.* at 299. The trial court entered judgment for plaintiffs in the amount of $544,682 in compensatory damages and $1,634,046 in punitive damages. *See id.* at 300. The jury initially returned a punitive damages award of $15 million, which the trial court reduced pursuant to section 34-4-34-4 of the Indiana Code. *See id.* at 297. Cobb also filed a motion to correct error, contending that the trial court should have offset the amount of compensatory damages awarded by funds Cobb received from settlements with other defendants because the jury had found OC to be 100% at fault. *See id.*

174. *See id.* at 297. The trial court also granted a stay of enforcement of judgment pending OC's appeal and Cobb's cross-appeal. *See id.*

175. *See id.* Cobb cross-appealed the trial court's award of damages, claiming that Indiana's Tort Claims Act unconstitutionally limited his right to punitive damages and that his compensatory damages should not have been offset by amounts received by settlements with other defendants. *See id.* Because the court of appeals decided the case on product identification issues, the court never reached any of OC's nonparty arguments or any of Cobb's cross-appeal arguments.

damage awards and to enter summary judgment in favor of OC.[176]

OC argued that Cobb failed to provide any evidence proving that he was exposed to asbestos-containing products manufactured or distributed by OC.[177] The court of appeals directly quoted much of the evidence OC designated in support of its motion. OC's designated evidence of record revealed that Cobb had heard of "Kaylo," that he knew it was a pipe covering insulation, and that it was associated with Owens Corning.[178] Cobb never personally installed Kaylo products.[179] He did, however, occasionally remove and repair pipe covering previously installed by other crews.[180] He allegedly did not know what company manufactured the pipe covering he removed and repaired because it did not bear any brand names or other identifying features.[181]

OC's designation of Cobb's testimony further revealed that Cobb had been on job sites where Kaylo was used while working for Indianapolis Public Schools and that Cobb believed he was exposed to airborne asbestos particles because insulators were installing pipe covering in his general area at those sites.[182] Cobb testified that he thought he first began working around insulators using Kaylo in 1963 or 1964, but he could not recall at which school or schools Kaylo was used.[183] He likewise could not recall any other particular place where he would have seen Kaylo being installed.[184] In addition, Cobb testified that he never personally ordered any Kaylo product; he could identify Kaylo only because he recalled seeing boxes of that product at various locations.[185]

In light of the foregoing facts of record, the court of appeals determined that OC's designated evidence was sufficient to pass the burden to Cobb to establish a genuine issue of material fact:

> In construing the above evidence in favor of Cobb as the nonmoving party, we can conclude only that Cobb *may* have been exposed to Kaylo asbestos fibers at some time during his work for Indianapolis Public Schools. There is no evidence whatsoever that Cobb actually installed or removed Kaylo himself, and there exists only the possibility that the insulators installed or removed Kaylo when Cobb was present at an undetermined jobsite.
>
> To further conclude that the insulators' work actually released Kaylo asbestos fibers into the air and that Cobb actually inhaled those fibers

176. *See id.* at 303-04.
177. *See id.* at 300.
178. *Id.*
179. *See id.* at 300-01.
180. *See id.* at 301.
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*

> into his lungs would require an even more tenuous reliance on mere inferences, not facts. Finally, to conclude that Kaylo asbestos fibers actually caused Cobb's injuries would stretch the chain of logic to the breaking point. Cobb cited a Seventh Circuit asbestos case to support his argument, but we need look no further than *Roberson*[*v. Hicks*, 694 N.E.2d 1161, 1163 (Ind. Ct. App. 1998), *trans. denied*, 706 N.E.2d 170 (Ind. 1998)] to establish that Cobb's burden to prove causation "may not be carried with evidence based merely on supposition or speculation." Because OC's designated evidence shows there was no genuine issue of material fact with respect to the causation of Cobb's injuries, the burden then passes to Cobb to establish the contrary.[186]

In response, plaintiffs/appellees argued that because Cobb testified that Kaylo was present at a job site where he worked and that he removed pipe covering, it could be inferred that the pipe covering removed by Cobb was Kaylo and that the act of removal exposed Cobb to OC's asbestos-containing Kaylo.[187] Plaintiffs/appellees further argued that because Cobb testified that he saw boxes on his job site with the words "Owens Corning"and "Kaylo" printed on them, it could be inferred that the Kaylo boxes Cobb saw were used for pipe covering insulation and that Cobb could have been exposed to the Kaylo in the course of his work with the pipes.[188]

According to the court of appeals, such evidence, "though voluminous, fails to demonstrate a genuine issue of material fact as to whether Cobb was ever actually exposed to Kaylo asbestos fibers, let alone whether exposure to Kaylo caused his injuries."[189] The court's concluding rationale is as follows:

> Although Cobb's testimony places an undetermined number of boxes containing Kaylo at an undetermined number of jobsites at which he worked, it contains no facts from which the trial court could conclude that Cobb had been exposed to Kaylo asbestos fibers—whether from work performed by Cobb himself or by others. If anything, the additional deposition pages designated by Cobb actually strengthen OC's assertion that Cobb's exposure claim was based solely on conjecture—especially when one considers that the insulators also used Armstrong products when working in Cobb's vicinity. Certainly, one could draw the inference that Cobb was exposed to Kaylo asbestos fibers if Kaylo was installed or removed in his presence, but we strongly reiterate that an inference may fail as a matter of law when it 'can rest on no more than speculation or conjecture.' . . . Without concrete facts to support his inference of exposure, Cobb cannot show the existence of a genuine issue of material fact regarding OC's causation of his injuries. Therefore, the trial court erred in denying OC's motion for summary

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186. *Id.* at 302 (emphasis added) (citation and footnote omitted).

187. *See id.*

188. *Id.*

189. *Id.*

judgment based upon lack of product identification.[190]

Judge Riley offered a dissenting opinion in which she concluded that Cobb produced sufficient evidence to support an inference that he inhaled asbestos dust produced by OC during his tenure at IPS.[191] Judge Riley's opinion further disagrees with the majority's treatment of burden shifting in light of Indiana's divergence from federal law in this area after *Jarboe v. Landmark Community Newspapers of Indiana.*[192] According to Judge Riley, "[m]erely alleging that Cobb has failed to produce evidence of causation, an essential element to Cobb's case, is insufficient to entitle Owens-Corning to summary judgment under Indiana law."[193] Finally, while conceding that no Indiana appellate court has yet established a test for causation in asbestos cases, Judge Riley approves of what she termed the "job site" test for causation as stated in *Peerman v. Georgia-Pacific Corp*.[194]

In a case involving a procedural issue virtually identical to the one in *Cobb*, the court of appeals reached a seemingly different result and, perhaps indicative of Cobb's ultimate fate, the Indiana Supreme Court has denied transfer. In *Lenhardt Tool & Die Co. v. Lumpe*,[195] Lumpe was injured in an explosion at a brass melting facility. Lenhardt apparently manufactured some of the molds used at the facility at the time of the explosion, but no one could identify or locate the molds and plugs used at the time of the explosion.[196]

Lenhardt filed a motion for summary judgment because Lumpe could not prove that Lenhardt negligently manufactured the molds at issue. In the court of appeals, Lenhardt again pressed the procedural aspect of the case by contending that once it demonstrated that Lumpe could not prove the mold was manufactured by Lenhardt, the burden shifted to Lumpe pursuant to Rule 56 of the Indiana Rules of Trial Procedure to come forward with evidence to prove the mold was manufactured by Lenhardt.[197] If Lumpe failed to do so, Lehardt argued, it was entitled to summary judgment.

The court of appeals disagreed in light of what a majority of the panel in *Lenhardt* called the "contrast between the federal practice as expressed in *Celotex Corp. v. Catrett*[198] and our state practice as expressed in *Jarboe [v. Landmark Community Newspapers]*."[199] According to a majority of the *Lenhardt*

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190. *Id.* at 303 (citations omitted).

191. *See id.* at 304 (Riley, J., dissenting).

192. 644 N.E.2d 118, 123 (Ind. 1994).

193. *Cobb*, 714 N.E.2d at 305 (Riley, J., dissenting).

194. *Id.* (citing *Peerman*, 35 F.3d 284, 287 (7th Cir. 1994)).

195. 703 N.E.2d 1079 (Ind. Ct. App. 1998), *trans. denied*, 722 N.E.2d 824 (Ind. 2000). See *supra* notes 67-85 and accompanying text for more detailed analysis of *Lenhardt Tool & Die Co.*'s substantive merits.

196. *See id.* at 1081.

197. *See id.*

198. 477 U.S. 317 (1986).

199. *Lenhardt Tool & Die Co.*, 703 N.E.2d at 1081 (citing Jarboe v. Landmark Community

court, *Jarboe* requires Lenhardt to first designate evidence that Lenhardt did not manufacture the mold in order to require Lumpe to come forward with evidence that Lenhardt manufactured it.[200] "Simply demonstrating that Lumpe does not have sufficient evidence to prove the mold was manufactured by Lenhardt is not enough."[201] Accordingly, the majority of the *Lenhardt Tool & Die Co.* panel held that the trial court properly denied Lenhardt's motion for summary judgment on the negligence claim.[202]

Judge Garrard dissented, disagreeing with the majority's conclusion that Lenhardt had to designate some evidence that it did not manufacture the mold in order to secure summary judgment.[203] In Judge Garrard's view, "[i]t would have been sufficient for summary judgment had Lenhardt been able to show that Lumpe had no evidence that Lenhardt made the mold and would not be able to get anything further."[204]

On January 31, 2000, Justices Dickson and Sullivan of the Indiana Supreme Court voted to deny transfer in *Lenhardt Tool & Die Co.*[205] Justice Boehm and Chief Justice Shepard voted to accept transfer. Justice Rucker did not participate. Although there was no majority with respect to the transfer decision, the petition was deemed denied pursuant to Indiana Appellate Rule 11(B)(5). Justice Boehm wrote an opinion dissenting from the order denying transfer, which Chief Justice Shepard joined. In his dissenting opinion, Justice Boehm wrote that he believed that the court should grant transfer to clarify Indiana's summary judgment standard. Justice Boehm concluded that the majority opinion in *Lenhardt Tool & Die Co.* "reflects a widespread misunderstanding of how the summary judgment standard is to work under Trial Rule 56."[206]

Both *Cobb* and *Lenhardt Tool & Die Co.* are product identification cases in which the motions for summary judgment turned on the sufficiency of the plaintiffs' designated evidence. The Indiana Supreme Court appears poised to address in *Cobb* whether and to what extent tension exists between how the court

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Newspapers, 644 N.E.2d 118 (Ind. 1994)).

200. *See id.* at 1083.

201. *Id.*

202. *See id.*

203. *See id.* at 1085 (Garrard, J., dissenting).

204. *Id.* at 1086.

205. *See* 722 N.E.2d 824 (Ind. 2000).

206. *Id.* at 825 (Boehm, J., dissenting). Justice Boehm wrote that the *Jarboe* holding

> has been understood by some, including the Court of Appeals in [*Lenhardt*], to require Lenhardt to establish a negative proposition, i.e., that the mold did not come from Lenhardt. In my view, this is an incorrect reading of Trial Rule 56, and of Jarboe, and leads to unnecessary expense to litigants and to unwarranted demands on judicial resources. Rather than require that Lenhardt prove that the mold came from someone else, I believe it was sufficient for summary judgment that Lenhardt establish (i.e., show that there is no genuine issue of material fact bearing on the issue) that Lumpe could not carry his burden of proof at trial that the mold was from Lenhardt.

Id.

of appeals disposed of the cases. Clearly, Justice Boehm's dissenting opinion from the denial of transfer in *Lenhardt Tool & Die Co.* reveals that the issue is one to which the court is giving some consideration.

Celotex, the case out of which the now-famous federal summary judgment standard arose, was an asbestos case. As many product liability practitioners well know, such cases nearly always hinge on a claimant's ability to properly identify or recall the allegedly offending product or products that caused or contributed to his or her injuries. Defense practitioners often have argued that the *Celotex* standard is both helpful in and necessary to achieving some judicial control over litigation. Indiana's disavowment of *Celotex,* to the extent that there is one, occurred in a more traditional setting. Indeed, *Jarboe* was a wrongful discharge case. Thus, in cases such as *Lenhardt Tool & Die Co.* and *Cobb*, in which product identification is an essential, threshold issue, the Indiana Supreme Court in *Cobb* may feel the need to examine the propriety and utility of adherence to a *Jarboe* summary judgment standard.

IV. USE OF EXPERTS IN A PRODUCT LIABILITY CONTEXT

In *Howerton v. Red Ribbon, Inc.*,[207] Stanley Howerton used a grab bar to pull himself out of a hotel bathtub. As he pulled on the bar, it came out of the wall. Howerton fell as a result and injured his knee.[208] The Howertons initially sued the motel owner and franchisor and later added a product liability claim against Sterling Plumbing Group. The Howertons' claim against Sterling alleged negligence in design and manufacture of the grab bar unit and that the unit was in a defective condition unreasonably dangerous to Howerton.[209]

At trial, the judge conducted a hearing on Sterling's motion in limine challenging the admissibility of testimony by the Howertons' engineer, James McCann. The trial judge concluded that the expert testimony would confuse the jury and was not supported by reliable scientific principles.[210] The trial court did allow McCann to testify as a fact witness about what he observed when examining the unit and to identify himself as an engineer. McCann testified that when he examined the grab bar under a microscope, he observed microscopic signs of wear near the hole on one end of the bar.[211]

At the conclusion of the Howertons' presentation of liability evidence, the trial court granted judgment on the evidence to each defendant, and the court of appeals affirmed.[212] In their appeal, the Howertons first argued that the trial court erred in applying the *Daubert*[213] standard to McCann's testimony because

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207. 715 N.E.2d 963 (Ind. Ct. App. 1999), *trans. denied*, No. 18A02-9806-CV-504, 2000 Ind. LEXIS 89 (Ind. Feb. 4, 2000).

208. *See id.* at 965.

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

McCann was providing technical, not scientific testimony.[214] After writing that trial courts must consider Rules 403 and 702 of the Indiana Rules of Evidence in determining whether to exclude expert testimony, the court itemized in great detail many factors that affected the foundation of McCann's testimony.[215]

For example, McCann did not examine the entire unit, he did not remove the unit to examine its back, he did not know whether any water damage to the unit had occurred, he had not performed any tests on the unit or on the grab bar, nor did he test exemplars.[216] According to the court, McCann did not know about any of the following: (1) how the unit was installed or manufactured; (2) which end of the grab bar had come from which hole in the unit; (3) whether any other Sterling units had failed; (4) the unit's condition when it left Sterling; (5) the strength of the bar; or (6) Sterling's manufacturing procedures for installing a grab bar in a unit.[217] Moreover, McCann had not reviewed design standards for grab bars, had no evidence regarding the condition of the unit at the time it was installed, did not know the strength or exact composition of the unit's fiberglass, and had performed no research seeking literature related to grab bars or similar units.[218]

In light of the fact that McCann did not undertake such tasks, the court of appeals agreed with the trial court that "McCann's opinion of a defect in the manufacturing and design of the unit would not be reliably or scientifically 'connected' to the principles of engineering, and any such opinion by him is thereby rendered more likely to be 'subjective belief or unsupported speculation.'"[219] The court of appeals then pointed out that the Howertons did not challenge the trial court's finding that McCann's expert testimony would confuse the jury, and held that such ruling was not an abuse of discretion.[220]

The court of appeals also briefly addressed the propriety of the trial court's grant of judgment of the evidence to Sterling.[221] On that issue, the Howertons argued that judgment on the evidence was improper because there was testimony about the possibility that a cotter pin might never have been installed at one end

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214. *See id.* at 966. In *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court expanded the *Daubert* reliability requirements to experts testifying about non-scientific principles. Rule 702(b) of the Indiana Rules of Evidence presently requires an Indiana court's satisfaction that the scientific principles upon which the expert testimony rests are reliable.

215. *See Howerton*, 715 N.E.2d at 966.

216. *See id.*

217. *See id.*

218. *See id.* at 966-67.

219. *Id.* at 967 (citing Hottinger v. Trugreen Corp., 965 N.E.2d 593, 596 (Ind. Ct. App. 1996)).

220. *See id.* Because the *Howerton* court found no abuse of discretion in the trial court's decision to exclude McCann's testimony because it would confuse the jury, the court declined to address the Howertons' argument that McCann's expert testimony was technical rather than scientific in nature and, therefore, not subject to a determination by the trial court concerning the reliability of the testimony's underpinnings. *See id.* at 967 n.3.

221. *See id.* at 967.

of the bar.[222] At trial, a contractor involved in the construction of more than a hundred motels and who had supervised the installation of several thousand bath/shower units opined about the possibility of a missing cotter pin. The contractor testified, "[I]n things mechanical, practically anything is possible I think."[223]

According to the *Howerton* court, such testimony does not constitute the testimony of a fact being possible as contemplated by the court's earlier opinion in *Noblesville Casting Division of TRW, Inc. v. Prince*,[224] the case upon which the Howertons relied.[225] Thus, the court could not reverse the trial court's decision to grant judgment on the evidence to Sterling.[226]

Howerton does not directly tackle the issue of the trial court's application of *Daubert* to technical testimony. Practitioners should nevertheless be aware of the U.S. States Supreme Court's decision in *Kuhmo Tire Co. v. Carmichael*[227] to apply *Daubert* requirements in non-scientific cases. Although Rule 702 of the Indiana Rules of Evidence contemplates a *Daubert*-like reliability analysis only in cases involving "expert scientific testimony," it will be interesting to see whether Indiana courts now may be more willing to apply *Daubert* in non-scientific cases in light of *Kuhmo Tire.* It also remains to be seen whether Rule 702 of the Indiana Rules of Evidence will be amended or revised in light of *Kuhmo Tire.*

V. STATUTES OF REPOSE AND LIMITATION

A. The Asbestos Trio

Beginning in February and continuing through the spring of 1999, the Indiana Court of Appeals issued a trio of opinions addressing Indiana's limitation of action provisions as those provisions apply to claims involving damages allegedly caused by exposure to asbestos. The cases in which the court of appeals offered those opinions are *Sears Roebuck and Co. v. Noppert*,[228] *Novicki v. Rapid-American Corp.*,[229] and *Holmes v. ACandS, Inc.*[230]

The plaintiffs in *Noppert* filed a product liability suit against several defendants, including Sears, alleging damages as the result of exposure to asbestos. Sears filed a motion for summary judgment arguing that the repose

222. *See id.*
223. *Id.* (citing the trial record).
224. 438 N.E.2d 722 (Ind. 1982).
225. *See Howerton*, 715 N.E.2d at 967.
226. *See id.*
227. 526 U.S. 137 (1999).
228. 705 N.E.2d 1065 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 300 (Ind. 1999).
229. 707 N.E.2d 322 (Ind. Ct. App. 1999).
230. 709 N.E.2d 36 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 314 (Ind. 1999).

period in section 33-1-1.5-5 of the Indiana Code[231] barred the Nopperts' claims.[232] Section 33-1-1.5-5 of the Indiana Code provided, in relevant part, that "a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer."[233] There is no indication in the court's opinion that either party disputed that the Nopperts failed to file their lawsuit within ten years after delivery of the allegedly offending products to the initial user or consumer.

The trial court granted Sears' motion for summary judgment twenty-three days after it was filed.[234] The Nopperts then filed a motion to vacate the trial court's entry of summary judgment because the trial court did not afford them the thirty days allowed under Rule 56 of the Indiana Rules of Trial Procedure in which to respond to a motion for summary judgment. The court denied the Nopperts' motion shortly after it was filed.[235] Thirty-three days after the court denied the Nopperts' motion to vacate, the Nopperts filed a motion to correct errors, again claiming that the trial court did not allow them adequate time to respond to the summary judgment motion. The trial court granted the motion to correct errors.[236]

Sears appealed the trial court's grant of the Nopperts' motion to correct errors, arguing that the Nopperts failed to file the motion within the thirty days provided by the Indiana Rules of Trial Procedure, and because, in any event, the Nopperts did not have a meritorious defense to the summary judgment motion.[237] The Nopperts countered by arguing that the trial court could properly consider the motion to correct errors as a motion filed pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure and, therefore, the trial court's granting of the motion was not an abuse of discretion.[238]

The court of appeals disagreed with the Nopperts, recognizing that "a [Rule] 60(B) motion is not an appropriate substitute for the timely filing of an appeal,

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231. *Now*, IND. CODE § 34-20-3-1 (1998).

232. *See Noppert*, 705 N.E.2d at 1066.

233. The Code also provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." IND. CODE § 34-20-3-1(b) (formerly, IND. CODE § 33-1-1.5-5(b)). As the statute makes clear, a claimant must bring a product liability action in Indiana within two years after it accrues, but in any event, not longer than ten years after the product is first delivered to the initial user or consumer. Such is true unless the action accrues in the ninth or tenth year after delivery, in which case the full two-year period is preserved, commencing on the date of accrual. Accordingly, the longest possible time period in which a claimant may have in which to file a product liability claim in Indiana is twelve years after delivery to the initial user or consumer, assuming accrual at some point in the twelve months immediately before the tenth anniversary of delivery. *See id.*

234. *See Noppert*, 705 N.E.2d at 1066.

235. *See id.* at 1066-67.

236. *See id.* at 1067.

237. *See id.*

238. *See id.*

pursuant to Ind[iana] Appellate Rule 2, based upon issues known or discoverable within the thirty days available to pursue an appeal."[239] In addition, the court stated that "[r]elief is only properly provided under Rule 60(B) after a failure to perfect an appeal when there is some *additional fact* present justifying extraordinary relief which allows a trial court to invoke its equitable power to do justice."[240] According to the court, it was "clear from the record that the Nopperts were aware of the trial court's summary judgment ruling well before the thirty days for filing an appeal had elapsed."[241] Thus, the court found no extraordinary factors to justify the filing of a Trial Rule 60(B) motion.[242]

The second portion of the court of appeals' analysis focused upon the propriety of the Nopperts' defense at trial because Indiana law required them to show that they had a meritorious defense to Sears' summary judgment motion if the court was to consider their motion to correct errors a Trial Rule 60(B) motion.[243] In that connection, the court of appeals concluded that, as a matter of law, the Nopperts did not have a meritorious defense because the statute upon which they relied as the exception to the application of the statute of repose did not apply to Sears.[244] The Nopperts argued that section 33-1-1.5-5.5 of the Indiana Code[245] is a statutory exception to application of the ten-year statute of repose in asbestos cases. The Nopperts also relied on the Indiana Supreme Court's decision in *Covalt v. Carey Canada, Inc.*[246]

Section 33-1-1.5-5.5 of the Indiana Code did, indeed, provide an exception to the product liability statute of limitations and statute of repose:

> (a) A product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.
>
> (b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.

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239. *Id.*
240. *Id.* (emphasis added) (quoting 4 WILLIAM F. HARVEY, INDIANA PRACTICE 174 (1991)).
241. *Id.*
242. *See id.*
243. *See id.*
244. *See id.* at 1068.
245. *Now*, IND. CODE § 34-20-3-2 (1998).
246. 543 N.E.2d 382 (Ind. 1989).

> (d) This section applies only to product liability actions against: (1) persons who mined and sold commercial asbestos; and (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.[247]

The court of appeals determined, however, that the statutory language in section (d) controls and that the "discovery rule" exception to the statute of repose applies only against persons who mined and sold commercial asbestos and against funds described in that section.[248] Because the court determined that Sears does not fall into either category, the "discovery rule" exception in section 33-1-1.5-5.5 of the Indiana Code does not apply to it.[249]

In *Novicki*, the estate of a deceased welder filed a wrongful death action against Rapid-American Corporation ("Rapid") and forty-four other defendants.[250] On October 19, 1993, the decedent was diagnosed with mesothelioma, a malignant tumor principally caused by exposure to asbestos. He died from that disease on March 4, 1995. His estate filed suit on March 4, 1997.[251]

Rapid and several other defendants filed a motion to dismiss, arguing that Novicki's complaint had not been commenced within the statute of limitations found in section 33-1-1.5-5.5 of the Indiana Code.[252] The court's opinion refers to the provision as "Section 5.5." Rapid and its co-defendants based their argument on language in section 5.5, providing that product liability actions based on "personal injury, disability, disease, or death resulting from exposure to asbestos" must be initiated within two years from the date that the "injured person knows that the person has an asbestos related disease or injury."[253] Because plaintiff's wrongful death claim was not filed within two years of

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247. IND. CODE § 33-1-1.5-5.5 (recodified at IND. CODE § 34-20-3-1 (1998)).

248. *Noppert*, 705 N.E.2d at 1068. With respect to the first category of defendants (miners and sellers), the court made it clear that the entities to which the statute applies are entities that both mined *and* sold commercial asbestos: "[W]hile courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation." *Id.*

249. On petition to transfer to the Indiana Supreme Court, the Nopperts argued, in part, that the court of appeals' interpretation of section 33-1-1.5-5.5 of the Indiana Code violated article 1, sections 12 and 23 of the Indiana Constitution. The Indiana Supreme Court denied transfer on August 18, 1999, without issuing an opinion. *See Noppert*, 1999 Ind. LEXIS 691.

250. *See* Novicki v. Rapid-American Corp., 707 N.E.2d 322, 322 (Ind. Ct. App. 1999).

251. *See id.*

252. As the *Novicki* court aptly recognized in footnote four of its opinion, the Indiana General Assembly in 1998 amended in part and recodified the IPLA. *See id.* at 323 n.4. The new statutory provisions for the IPLA are found in sections 34-20-1-1 to 34-20-9-1 of the Indiana Code. *See id.* Only minor, non-substantive changes were made to the sections of the Act at issue in *Novicki. See id.*

253. *Id.* at 323.

October 19, 1993, the date when the decedent was first diagnosed with mesothelioma, the trial court agreed with Rapid's argument and dismissed the claim as untimely.[254]

The court of appeals reversed and remanded without addressing whether section 5.5 time-barred plaintiffs' claims.[255] Instead, the *Novicki* court pointed out that section 5.5 does not apply to Rapid.[256] Recognizing the court's holding in *Noppert*,[257] the *Novicki* court agreed that the two-year "discovery" rule stated in section 5.5 applies only to product liability actions against persons who mined and sold commercial asbestos and to product liability actions against funds which have been created as a result of bankruptcy proceedings for the payment of asbestos related disease claims or asbestos related damage claims.[258] Because Rapid did not both mine and sell commercial asbestos, the court held that it could not invoke section 5.5 and rely upon it as a basis for dismissal of plaintiff's complaint.[259] The court stated:

> Rapid-American cannot invoke section 5.5 merely for the sake of argument; the section does not apply since Rapid-American never mined and sold commercial asbestos. Thus, we must conclude that to the extent the trial court relied upon Section 5.5 instead of Section 5, Novicki's complaint was improperly dismissed as untimely.[260]

The "Section 5" to which the court refers is section 33-1-1.5-5 of the Indiana Code,[261] which, as noted above, embodies Indiana's general limitation of action provisions for product liability cases. Rather than attempt to analyze the case under section 5 and the applicable case law without any briefing from the parties, the *Novicki* court simply remanded the case to the trial court for further proceedings and additional argument with respect to the applicability of section 5 to the underlying facts.[262]

Holmes[263] is a case that involves exactly the same issue the parties presented in *Novicki*. However, the court of appeals panel considering *Holmes* chose not to dispose of the case in quite the same fashion as did the panel in *Novicki.* The

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254. *See id.*

255. *See id.*

256. *See id.* at 324.

257. *See id.* at 324 n.6.

258. *Id.* at 324.

259. *See id.*

260. *Id.* In *Novicki*, Rapid assumed for the sake of argument that the statute of limitations in section 33-1-1.5-5.5 of the Indiana Code (now codified at section 34-20-3-2) applied to it notwithstanding section 33-1-1.5-5 of the Indiana Code (now section 34-20-3-1) and its alternative argument that the latter statute time-barred plaintiffs' claims as well. *See Novicki*, 707 N.E.2d at 324.

261. IND. CODE § 33-1-1.5-5 (recodified at § 34-20-3-1 (1998)).

262. *See Novicki*, 707 N.E.2d at 324-25.

263. Holmes v. ACandS, Inc., 707 N.E.2d 36 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 314 (Ind. 1999).

Holmes court addressed the issue as the parties presented and argued it.

In *Holmes*, plaintiff's decedent was diagnosed with lung cancer in June 1994 and died of that disease about a month later, on July 22, 1994. Two years to the day that plaintiff's decedent died, July 22, 1996, plaintiff filed suit individually and as personal representative of the decedent's estate.[264] Several defendants filed motions for summary judgment based upon what is now section 34-20-3-2 of the Indiana Code,[265] which, as noted above, provides:

> (a) A product liability action that is based upon:
> (1) property damage resulting from asbestos; or
> (2) personal injury, disability, disease, or death resulting from exposure to asbestos;
> must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.
> (b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.[266]

Because the plaintiff's wrongful death claim was not filed within two years of June 20, 1994, the date on which the decedent knew that he had an asbestos related disease, the trial court granted summary judgment to several defendants and dismissed with prejudice the remaining defendants.[267]

The court of appeals reversed, holding that a product liability claim for wrongful death resulting from an asbestos related disease or injury accrues on the date when the decedent died.[268] In its appeal, the decedent's estate argued that the decedent's death is a separate injury from his cancer and, as such, a wrongful death action is not barred by the two-year statute of limitations now found in section 34-20-3-2 of the Indiana Code.[269] Although the court did not necessarily agree that the date of the decedent's diagnosis had absolutely no bearing upon the wrongful death claim, the court disagreed with the defendants' contention that Indiana's wrongful death statute requires a wrongful death action to be filed within a time when the decedent might have brought it had he lived.[270] "A plain reading of the statute indicates that the time of the decedent's death is determinative of what actions the decedent 'might have maintained,' not the time the action is ultimately brought."[271]

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264. *See id.* at 38.

265. Formerly, IND. CODE § 33-1-1.5-5.5. Because the court in *Holmes* refers to the present statutory cites, this survey will do the same.

266. *Id.* § 34-20-3-2.

267. *See Holmes*, 709 N.E.2d at 38.

268. *See id.* at 44.

269. *See id.* at 38.

270. *See id.* at 40.

271. *Id.* The *Holmes* court expressed no opinion regarding whether Holmes's action would

With respect to the interpretation of the general assembly's language in what is now section 34-20-3-2 of the Indiana Code, the court first recognized that "[w]hile the cause of action for wrongful death accrues upon the date of the death of the decedent, a product liability action for personal injury accrues when the plaintiff knows or should have discovered his injury or disease."[272] The court then determined that section 34-20-3-2(b) of the Indiana Code does not specifically address accrual of an action for "death."[273] The court's threshold reasoning with respect to its interpretation of the language in section 34-20-3-2 of the Indiana Code is as follows:

> We presume that the legislature was aware of the Wrongful Death Statute when it enacted Ind.Code § 34-20-3-2, and chose not to provide for a different accrual date for wrongful death actions based upon product liability. Because we have the authority and responsibility to interpret the intentions of the legislature by deciding when a cause of action accrues, we conclude that a product liability cause of action for wrongful death resulting from exposure to asbestos accrues upon the date of death.[274]

Several of the appellees in *Holmes* sought an opinion on rehearing confirming that nothing in the *Holmes* opinion may be read to conflict with the court's earlier opinions in *Noppert* and *Novicki*. In a short opinion on rehearing, the court of appeals, indeed, reaffirmed that there is no conflict between its original opinion in *Holmes* and its earlier decisions in *Noppert* and *Novicki*.[275]

B. The Statute of Repose

Section 34-20-3-1(b) of the Indiana Code provides, in relevant part, that a product liability action "must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer."[276] The latter of those clauses is generally referred to as Indiana's statute of repose.

Although not product liability cases, the Indiana Supreme Court's decisions

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be barred if more than two years had transpired between his discovery of the injury and his death. *See id.*

272. *Id.* at 41. Although the court inserted the phrase "should have discovered," section 34-20-3-2(b) of the Indiana Code does not require that standard. The statute requires actual knowledge. "A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury." IND. CODE § 34-20-3-2(b) (1998).

273. *Holmes*, 709 N.E.2d at 41.

274. *Id.* (citation omitted).

275. *See* Holmes v. ACandS, Inc., 711 N.E.2d 1289 (Ind. Ct. App. 1999).

276. IND. CODE § 34-20-3-1(b) (1998). The statute also recognizes that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." *Id.*

in *Martin v. Richey*[277] and in *Van Dusen v. Stotts*[278] may have some impact on product liability cases, particularly those cases involving injuries that have prolonged latency periods. In *Martin*, the supreme court held that, although not unconstitutional on its face, the occurrence-based statute of limitations in Indiana's Medical Malpractice Act[279] violates article 1, sections 12 and 23 of the Indiana Constitution insofar as it applies to Martin.[280]

The *Martin* case involved an alleged claim of medical malpractice against a physician for failure to appropriately diagnose and treat her breast cancer.[281] Martin did not "discover" her condition until more than two years from the "occurrence" of the alleged malpractice and, therefore, beyond the Act's two-year limitations period.[282] In such a situation, the *Martin* court determined that application of the two-year occurrence-based statute of limitations is unconstitutional under article 1, section 23 of the Indiana Constitution because it is not "'uniformly applicable'" to all medical malpractice victims given that victims such as Martin are precluded from pursuing a claim in light of the prolonged period of time between the alleged act of malpractice and the discovery of their condition.[283] According to the court, the statute of limitations, as applied to Martin, is also unconstitutional under article 1, section 12 of the Indiana Constitution because it requires Martin to file a claim before she is able to discover the alleged malpractice and her resulting injury.[284]

Practitioners pondering just exactly how Indiana courts would interpret the *Martin* court's effort to limit its holding to the circumstances presented there did not have to wait very long for their answer, at least in the context of the IPLA's ten-year statute of repose. The court's pronouncement came in the form of a 3-2 decision in the case of *McIntosh v. Melroe Co.*[285] On May 26, 2000, the court held that the ten-year statute of repose contained in the IPLA does not violate sections 12 or 23 of article 1 of the Indiana Constitution.[286]

Many product liability practitioners had been keeping an eye on the *McIntosh*

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277. 711 N.E.2d 1273 (Ind. 1999).

278. 712 N.E.2d 491 (Ind. 1999).

279. IND. CODE § 34-18-7-1(b).

280. *See Martin*, 711 N.E.2d at 1285.

281. *See id.* at 1276-77.

282. *Id.* at 1277.

283. *Id.* at 1279.

284. *See id.*

285. 729 N.E.2d 972 (Ind. 2000). Justice Boehm wrote the majority opinion, which Chief Justice Shepard joined. Justice Sullivan concurred in part and in result with a separate opinion. Justice Dickson wrote a dissenting opinion, in which Justice Rucker concurred. The court's decision affirmed the trial court's summary judgment in favor of the defendants. The Indiana Court of Appeals, in a 1997 opinion, also affirmed the trial court. *See* 682 N.E.2d 822 (Ind. Ct. App. 1997).

286. The court rendered its decision in *McIntosh* too recently to justify a full treatment in this Article. No doubt other commentators will provide extensive analysis of the decision in the coming year.

case because of its manifest importance to product liability practitioners and their clients. In light of *Martin*, the case seemed to acquire a broader significance in terms of its potential to shape Indiana constitutional scholarship.

The plaintiffs and their amici argued that the IPLA's statute of repose violated article 1, section 12 of the Indiana Constitution, often referred to as the "open courts" or "remedy by due course of law" provision. They also contended that the statute of repose violated article 1, section 23, often referred to as Indiana's "equal protection" clause.

In rejecting both challenges, the majority reaffirmed the basic right of the legislature to abrogate, as well as create, certain tort remedies. The twenty-six page majority opinion, drawing widely on Indiana precedent and considering the laws of many other states, represents a significant constitutional pronouncement in many respects, and may well limit in some ways *Martin*'s overall impact.

CONCLUSION

As the foregoing cases reveal, the 1999 survey period was a significant one in terms of the continued development of a body of law interpreting and applying key terms found in the IPLA. Cases such as *Shebel*, *Butler*, *Marsh*, *Lenhardt Tool & Die Co.* and *Miceli* should help practitioners apply the IPLA's provisions. Similarly, the *Hopper*, *Cole*, and *Indianapolis Athletic Club, Inc.* decisions should lend guidance to practitioners who seek to apply some of the IPLA's defenses.

Moreover, although the decisions in *McIntosh*, *Noppert*, *Novicki*, and *Holmes* have helped to shape and refine Indiana product liability practice, they represent the tip of the iceberg in terms of the continued development of Indiana product liability law.[287] Practitioners look to the new millennium with much anticipation for additional pronouncements from Indiana's courts and for unique and appropriate ways to apply the provisions of the IPLA.

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287. For example, there are cases now working their way through the state and federal appellate systems that ultimately will determine the applicability of the ten-year statute of repose in asbestos personal injury cases. *See, e.g.*, *Fulk v. ACandS, Inc.*, Court of Appeals Cause No. 45A04-0001-CV-008; *Black v. AlliedSignal, Inc.*, Court of Appeals Cause No. 45A04-9912-CV-565; *Poirer v. ACandS, Inc*, Court of Appeals Cause No. 45A03-9910-CV-388; *Noppert v. Rapid-American Corp.*, Court of Appeals Cause No. 84A04-0005-CV-179; *Spriggs v. Owens Corning Fiberglas*, Seventh Circuit Cause No. 99-2464; *Spoonamore v. John Crane, Inc.*, Seventh Circuit Cause No. 99-2465), and who qualifies as a "bystander" for purposes of recovery under the IPLA (*e.g., Stegmoller v. ACandS, Inc.*, Trial Court Cause No. 49D02-9501-MI-001-107).