ISBA Wrongful Death, Survival, and Catastrophic Injury Cases Seminar: Product Liability and Wrongful Death Cases

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I. Introduction

Product liability actions present unique challenges to plaintiff attorneys. They require an in-depth understanding of the law and facts in order to develop effective themes that will persuade jurors and maximize verdicts. The following materials should serve as reference guide for the basics of product liability claims, including product liability causes of action and defenses. I have also included some quick tips for creating better themes in product liability cases and a list of additional resources that may be helpful for attorneys handling product liability cases.

II. State of the Law

Illinois recognizes three general categories of product defects: (1) defects in a product's design; (2) defects in the way a product was manufactured; and (3) informational defects, such as inadequate warnings, directions, or instructions accompanying a product. Illinois Pattern Jury Instructions, Civil, No. 400.00 (2007) (hereinafter, IPI Civil (2007) No. 400.00).

Product liability actions arise under strict liability, negligence, and contract theories and, as a whole, are open to a number defenses not otherwise available. In Illinois, strict liability for products is codified in 735 ILCS 5/2-2101, whereas negligence and breach of warranty causes of

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action are brought under their traditional doctrines. Illinois recognizes several defenses to strict liability actions, such as assumption of the risk and unforeseeable misuse. Additionally, contributory negligence rules may reduce or bar damages in negligence cases.

III. Causes of Action

a. Strict Liability

i. Elements

To prove a prima facie case for strict liability, the plaintiff must show that (1) the injury or damage resulted from a condition of the product manufactured or sold by the defendant; (2) the condition was unreasonably dangerous; and (3) the condition existed at the time the product left the manufacturer's control. IPI Civil (2007) No. 400.00.

ii. Additional Requirements

Depending on the type of defect, courts may read in additional requirements to the fundamental elements of strict product liability. First, Illinois courts have emphasized a general foreseeability requirement in strict liability product defect cases. Illinois law requires that both the person using the product and the way in which the product is being used are "objectively reasonable to expect." *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 513 N.E.2d 387, 111 Ill. Dec. 944 (1987).

Second, Illinois caselaw has created two tests for determining whether a product is "unreasonably dangerous" due to a defect in a product's design. Courts will start by applying the "consumer expectations" test. This test holds a manufacturer-defendant liable if the product's danger is beyond what would be contemplated by an ordinary consumer with ordinary knowledge common to the community's characteristics. IPI Civil (2007) No. 400.00. After

applying the consumer expectations test, courts may also apply a "risk-utility" test. The risk-utility test weighs the benefits of the product against the risk of danger inherent in the design. Under this test, a product is unreasonable dangerous is the inherent' risk of danger outweighs the designs benefits to the individual and the public at large. IPI Civil (2007) No. 400.00.

Courts will consider number of factors in a risk-utility analysis. Those factors include, but are not limited to: (1) the availability and feasibility of alternate designs at the time of the product's manufacture; (2) whether the design conformed to design standards in the industry, design guidelines provided by an authoritative voluntary organization, or design criteria set by legislation or governmental regulation; (3) the utility of the product to the user and the public as a whole; (4) the safety aspects of the product, including the likelihood that it will eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; and (5) any instructions accompanying the product. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶85.

Finally, a product will also be unreasonably dangerous if a manufacturer failed to adequately warn of a danger or instruct on the proper use of a product. Nevertheless, manufacturers do not have a duty to warn of obvious and generally appreciated dangers or of risks that the manufacturer neither knew nor should have known about. IPI Civil (2007) No. 400.00.

b. Negligence

i. Elements

In any negligence case, the traditional elements of negligence apply. Namely, the plaintiff must establish: (1) the existence of a duty; (2) a breach of that duty; (3) an injury that was

proximately caused by that breach; and (4) damages. *Jablonski*, 2011 IL at ¶ 82. The plaintiff must establish that the manufacturer- or seller-defendant owed the plaintiff a duty of care that was violated and resulted in damages to the plaintiff from an injury that was proximately caused by the breach.

ii. Additional Requirements

In 2011, the Illinois Supreme Court applied the strict liability risk-utility test to the breach of duty analysis in negligence cases. *Jablonski*, 2011 IL 110096. The Court held that the traditional duty analysis in negligence cases required a balancing of the utility offered by the product against the risks inherent in the design of the product to determine if the manufacturer breached their duty to design a safe product. *Id.* at ¶86. Furthermore, the court noted that while conformity with industry standards was a relevant factor to be considered in the risk-utility test, failure to conform to industry standards was not dispositive of negligence. *Id.* at ¶ 92.

c. Breach of Warranty

Contract claims can also be brought for product liability actions. Both breach of implied and express warranty causes of action are available and can be viable alternatives to traditional tort approaches to product liability cases.

IV. Defenses

a. Statute of Limitation

Illinois has a two year statute of limitation for personal injury actions. 735 ILCS 5/13-202. However, an exception is made for product liability cases when a plaintiff cannot discover the injury or cause of injury until sometime after the two years has passed, as sometimes occurs in medical product or toxic substances cases. In such situations, Illinois law requires the plaintiff

to bring the action within two years of the date when the plaintiff knew, or with reasonable diligence should have known, of the existence of the injury, but no more than eight years after the date on which the injury occurred. 735 ILCS 5/13-213(d). Furthermore, in these cases, if the plaintiff was under 18, or legally disabled at the time of the injury, the period of limitations does not begin to run until the person turns 18, or the disability is removed. *Id*.

b. Statute of Repose

Illinois law bars strict liability actions not commenced within 12 years from the date of the first sale, lease, or delivery of possession by a seller, or 10 years from the date of the first sale, lease, or delivery of possession to its initial user, consumer, or non-seller, whichever period is earlier, for any product that is claimed to have injured or damaged the plaintiff. 735 ILCS 5/13-213(b).

c. Illinois Distributor Statute

Also known as the "seller's exception," the Illinois Distributor Statute requires non-manufacturing defendants in product liability actions to be dismissed from the action if the non-manufacturing defendant certifies the correct manufacturer of the subject product. Dismissal is mandatory unless the plaintiff can show that the defendant: (1) exercised some significant control over the design or manufacture of the product, or provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; (2) had actual knowledge of the defect in the product which caused the injury death or damage; or (3) created the defect in the product which caused the injury, death, or damage. 735 ILCS 5/2-621.

If a non-manufacturer defendant is dismissed, a plaintiff may also move to vacate the dismissal by showing one or more of the following: (1) the applicable period of statute of limitation or statute of repose bars the assertion of a cause of action against the manufacturer or manufacturers of the product allegedly causing the injury, death or damage; (2) the identity of the manufacturer given to the plaintiff by the certifying defendant(s) was incorrect; (3) the manufacturer no longer exists, cannot be subject to the court's jurisdiction, or, despite due diligence, is not amenable to service of process; (4) the manufacturer is unable to satisfy any judgment as determined by the court; or (5) the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff. 735 ILCS 5/2-621.

d. Contributory Negligence

In negligence cases, damages are barred if the plaintiff's contributory fault is found to be more than 50% of the proximate cause of the injury. 735 ILCS 5/2-1116. Similarly, contributory fault of less than 50% may proportionately reduce a plaintiff's damages. *Id.*

e. Assumption of the Risk

In strict liability actions, assumption of the risk arises when a plaintiff knows and appreciates the risk of injury and proceeds without regard for the danger. IPI Civil (2007) No. 400.00. Courts use a subjective test based on the specific plaintiff's knowledge, understanding, and appreciation of the danger. *Calderon v. Echo, Inc.*, 244 Ill.App.3d 1085, 614 N.E.2d 140 (1st Dist. 1993). It is not, however, an automatic complete defense. Instead, comparative fault principles apply and recovery will barred only if the plaintiff's fault in assuming the risk is more than 50 percent. 735 ILCS 5/2-1116.

f. Consumer Misuse

Caselaw defines misuse as "the use of a product for a purpose neither intended nor objectively foreseeable by a reasonably prudent manufacturer." IPI Civil (2007) No. 400.00. Historically, any kind of misuse is not an affirmative defense. More recently, courts have started to draw a distinction between *unforeseeable* and *foreseeable* misuse. Most appellate courts have concluded that unforeseeable misuse is not an affirmative defense, but instead constitutes comparative fault. IPI Civil (2007) No. 400.00. Other appellate courts have, however, held that unforeseeable misuse is an affirmative defense that will reduce a plaintiff's damages. *Arellano v. SGL Abrasives*, 246 Ill.App.3d 1002, 617 N.E.2d 130, 186 Ill.Dec. 891 (1st Dist. 1993). The Illinois Pattern Jury Instructions do not recommend instructing on misuse, but without definitive clarification from the Illinois Supreme Court, the status of unforeseeable misuse as an affirmative defense is a gray area of law. IPI Civil (2007) No. 400.08. Foreseeable misuse, on the other hand, is still not a defense and does not affect the defendant's responsibility. IPI Civil (2007) No. 400.00.

g. State of the Art

State of the art is not a defense to a product liability action. Bruce Schoumacher, *Illinois Law Manual* 5 (2012). A defendant may, however, introduce relevant evidence of compliance with established standards. *Id.* Similarly, a plaintiff may also introduce evidence of alternative designs to determine if a product was unreasonably dangerous. *Id.*

V. Themes

Developing and using themes is a crucial part of obtaining a favorable verdict in product liability cases that should not be underemphasized. Nevertheless, evidence wins cases. It is of equal importance to search for prior lawsuits and similar prior incidences that would have

provided notice to manufacturers and distributors when conducting your initial investigation of a product liability claim. Still, inexperienced attorneys may find creating a persuasive and successful theme one of the most difficult aspects of a product liability case. Therefore, the following quick tips offer ways to create a logical and straightforward narrative that will be easy for any juror to understand.

a. Simplify the Science

Jurors often complain that trial attorneys fail to explain or simplify complex issues. It is best to presume that jurors will not understand complex scientific concepts. Break the science down into easy to digest soundbites and use analogies.

b. Use Rhetorical Tools and Techniques

Rhetorical tools are your friend. Jurors are presented with an overwhelming amount of information in a short period of time. Use techniques such as repetition, metaphors, and tone of voice to help jurors comprehend and remember key information easily.

c. Anticipate Defenses and Use Themes to Rebut Them

Product liability is unique in the multiplicity of defenses available to defendants. Anticipate the defenses that will be raised. Then find ways to the incorporate your responses into your theme.

VI. Additional Resources

a. *Jablonski v. Ford Motor Co.*, 2011 IL 110096.
b. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168.
c. Illinois Pattern Jury Instructions, Civil, No. 400.00 (2007).
d. Charles W. Chapman, et al., *Product Liability in Illinois*, Law Bulletin (4th Ed. 2009)

e. Illinois Institute for Continuing Legal Education *Products Liability Practice Handbook* (2014 Ed.)

400.00

Strict Product Liability

Introduction

Strict product liability is imposed without regard to traditional questions of privity, fault, or the user's ordinary negligence. It was developed in response to the inadequacy of negligence and warranty remedies. Product liability cases based on negligence, warranties, or other contractually-related theories of liability are not covered by these instructions.

The Origins of Strict Liability

The evolution of strict product liability began with the imposition of liability on sellers of food when a special implied warranty theory was developed. *Race v. Krum*, 222 N.Y. 410, 118 N.E. 853 (1918); *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815). Although a privity requirement persisted for a time, even in food cases, that requirement was eventually abolished and the right to recover was extended to the injured consumer. *Tiffin v. Great Atl. & Pac. Tea Co.*, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Patargias v. Coca--Cola Bottling Co*., 332 Ill.App. 117, 74 N.E.2d 162 (1st Dist. 1947); *Welter v. Bowman Dairy Co.*, 318 Ill.App. 305, 47 N.E.2d 739 (1st Dist. 1943); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

The special warranty in the case of food was gradually expanded to intimate items such as hair dye and soap. *See e.g.*, *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954). In 1960, the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), further extended the special warranty theory to all products. The *Henningsen* decision, although not employing the term "strict liability in tort," resolved the privity dilemma and articulated the rationale upon which the total transition from special warranty to strict liability in tort would ultimately be made:

> The burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur . . . .
>
> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity . . . .
>
> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial. *Henningsen v. Bloomfield Motors, Inc.*, *supra,* 32 N.J. at 379-384, 161 A.2d at 81-84.

After Chief Justice Traynor of the California Supreme Court authored the decision adopting strict liability in tort in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963), the American Law Institute adopted Section 402A of the Restatement (Second) of Torts in 1964 which embraced the theory of strict liability in tort for defective products. The Illinois Supreme Court's decision in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), soon followed. The *Suvada* decision is the touchstone of strict liability in Illinois, and, although refinements have been supplied by subsequent decisions, the basic element of the theory enunciated therein remains unchanged today:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not as assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products ... made clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by [its] defective products unless those rules also serve the purposes for which such liability is imposed. *Suvada v. White Motor Co.*, 32 Ill.2d at 621, 210 N.E.2d at 187 (citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701).

Strict liability in tort for defective products is not a doctrine of absolute liability which entitles a person injured while using a product to recover from any member of the chain of production or distribution; it does not make the manufacturer, distributor or retailer an insurer of the consumer's safety. *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 111, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983); *Artis v. Fibre Metal Prods.*, 115 Ill.App.3d 228, 450 N.E.2d 756, 71 Ill.Dec. 68 (1st Dist. 1983). “Fault,” in the context of strict product liability, is the act of placing an unreasonably dangerous product in the stream of commerce.

Parties Subject to Strict Product Liability

At common law, in order to be subject to strict product liability, a defendant must be engaged in the business of placing such products in the stream of commerce. *Torres v. Wilden Pump & Eng'g Co.*, 740 F.Supp. 1370 (1990); *Timm v. Indian Springs Recreation Ass'n*, 187 Ill.App.3d 508, 543 N.E.2d 538, 135 Ill.Dec. 155 (4th Dist. 1989) (used golf cart, isolated sale; no liability). Any person in the chain of distribution of a product, including manufacturers, suppliers, distributors, wholesalers, retailers, and commercial lessors, could be held strictly liable for any defect. *Cruz v. Midland--Ross Corp.*, 813 F.Supp. 628 (1993); *Crowe v. Pub. Bldg. Comm'n*, 74 Ill.2d 10, 383 N.E.2d 951, 23 Ill.Dec. 80 (1978).

Legislation has modified the common law strict liability of non-manufacturers in the chain of distribution. The Distributor's Act, 735 ILCS 5/2-621, permits dismissal of strict liability claims against non-manufacturers not at the source of the chain of distribution in a product liability action. The dismissal must be based on an affidavit filed by the defendant that correctly identifies the manufacturer of the product. The court, however, cannot enter a dismissal if the plaintiff shows that the defendant filing the affidavit has exercised some significant control over

the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product, 735 ILCS 5/2-621(c) (1), or that the defendant had actual knowledge of the alleged defect, 735 ILCS 5/2-621(c) (2), or that the defendant created the alleged defect in the product, 735 ILCS 5/2-621(c) (3). Moreover, the plaintiff can move to vacate any order of dismissal if the statute of limitations has run against the manufacturer, 735 ILCS 5/2-621(b) (1), or if the manufacturer is not subject to personal jurisdiction in Illinois, 735 ILCS 5/2-621(b) (3).

Although strict product liability generally extends to sellers of all products, strict liability may not extend to sellers of used products under certain circumstances. Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill.2d 17, 329 N.E.2d 785 (1975) (seller of used car not strictly liable); *Timm v. Indian Springs Recreation Ass'n*, *supra*.

ELEMENTS OF PLAINTIFF'S CASE

Plaintiff's Prima Facie Case

To recover in strict product liability, a plaintiff must plead and prove that the injury or damage resulted from a condition of the product manufactured or sold by the defendant, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer's control. (*Coney*, *supra,* 97 Ill.2d at 111; *Hunt v. Blasius*, 74 Ill.2d 203, 210 (1978), *Suvada*, *supra,* 32 Ill.2d at 623; *Restatement Second of Torts, Section 402A*). The determination of whether a product is defective, and therefore unreasonably dangerous, is ordinarily a question of fact for the jury (*see Renfro v. Allied Indus. Equip. Corp.*, 155 Ill.App.3d 140, 155 (1987)), and, in making its determination, the credibility of the witnesses and the conflicts in the evidence are to be resolved by the jury. *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335 (1994).

Although the defendant's role in commerce will seldom be an issue, the plaintiff may also be required to prove that the defendant was in the business of selling the product and not solely an installer. *Restatement (Second) of Torts* §402A (1965).

The plaintiff may create an inference that the product was unreasonably dangerous by direct or circumstantial evidence that there was no abnormal use of the product, that there was no reasonable secondary cause of the injury, and that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. *Tweedy v. Wright Ford Sales*, 64 Ill. 2d. 570 (1976); *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993); *see* IPI 400.01.01 and 400.02.01.

Meaning of "Unreasonably Dangerous"

See Comment to IPI 400.06 and 400.06A for a discussion of the case law defining "unreasonably dangerous."

Types of Defects

Products can be defective and unreasonably dangerous in any of three ways. First, a particular item may contain a manufacturing flaw. Second, the product may be defectively

designed. Third, the product may have an informational defect (inadequate warnings, directions, or instructions affixed to or accompanying the product).

Manufacturing Defects

A particular unit of a product may be defective because of an imperfection resulting from some miscarriage during the manufacturing process. *See*, *e.g.*, *Tweedy v. Wright Ford Sales*, Inc., 64 Ill.2d 570, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976) (automobile with defective brakes); *McKasson v. Zimmer Mfg. Co.*, 12 Ill.App.3d 429, 299 N.E.2d 38 (2d Dist. 1973) (imperfections in surgical rod); *Kappatos v. Gray Co.*, 124 Ill.App.2d 317, 260 N.E.2d 443 (1st Dist. 1970) (defective plastic spray painting hose).

Design Defects

A product may be defective because its design renders it unreasonably dangerous.

There are two tests that may be used to establish a design defect. The first, which goes back to the original *Restatement (Second) of Torts* §402A, is known as the "consumer expectation" test. Under this test, the danger must go beyond that which would be contemplated by the ordinary consumer with ordinary knowledge common to the community as to its characteristics. *Restatement (Second) of Torts* §402A Comment (I) (1965); *Riordan v. Int'l Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985).

In addition to the consumer expectation test, the plaintiff may choose to prove a strict product liability case under the "risk-utility" test. Under this test, a product is unreasonably dangerous, subjecting a manufacturer to liability, if the design is a cause of the injuries and if the benefits of the challenged design are outweighed by the design's inherent risk of danger. *Lamkin v. Towner*, 138 Ill.2d 510, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990); *Palmer v. Avco Distrib. Corp.*, 82 Ill.2d 211, 412 N.E.2d 959, 45 Ill.Dec. 377 (1980). These principles were fully discussed by the Supreme Court in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai*, 224 Ill.2d 247 (2007); and *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329 (2008).

Inadequate Warnings and Instructions

A product also may be unreasonably dangerous because of a failure to adequately warn of a danger or a failure to adequately instruct on the proper use of the product. *Hammond v. N. Am. Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210, 73 Ill.Dec. 350 (1983). However, when a danger is obvious and generally appreciated, there is no duty to warn of that danger. *McColgan v. Envtl. Control Sys., Inc.*, 212 Ill.App.3d 696, 571 N.E.2d 815, 156 Ill.Dec. 835 (1st Dist. 1991); *Smith v. Am. Motors Sales Corp.*, 215 Ill.App.3d 951, 576 N.E.2d 146, 159 Ill.Dec. 477 (1st Dist. 1991).

A defendant has no duty to warn of risks of which it neither knew nor should have known at the time the product was manufactured. *Byrne v. SCM Corp.*, 182 Ill.App.3d 523, 538 N.E.2d 796, 131 Ill.Dec. 421 (4th Dist. 1989) (manufacturer of epoxy paint); *Salvi v. Montgomery Ward & Co.*, 140 Ill.App.3d 896, 489 N.E.2d 394, 95 Ill.Dec. 173 (1st Dist. 1986) (air gun manufacturer had no duty to warn of dangers of which it neither knew nor should have known);

Elgin Airport Inn, Inc. v. Commonwealth Edison Co., 89 Ill.2d 138, 432 N.E.2d 259, 59 Ill.Dec. 675 (1982) (supplier of electricity not strictly liable for failure to warn when it neither knew nor should have known about abnormal current); Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194, 37 Ill.Dec. 304 (1980) (pharmaceutical manufacturer can only be held liable for its failure to warn of those risks it knew or should have known at the time of manufacture).

Foreseeability

Both the person using the product and the use to which it is being put must be reasonably foreseeable. In *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974), the Illinois Supreme Court emphasized the foreseeability requirement:

> In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product, a position rejected by this Court in *Suvada*.

Id. at 11, 310 N.E.2d at 4; *see Woodill v. Parke Davis & Co.*, *supra*. Recognizing that "in retrospect almost nothing is entirely unforeseeable," *Mieher v. Brown*, 54 Ill.2d 539, 544, 301 N.E.2d 307, 309 (1973), the Supreme Court in *Winnett v. Winnett* and thereafter has interpreted foreseeability to mean "that which it is *objectively reasonable* to expect, not merely what might conceivably occur." *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 513 N.E.2d 387, 111 Ill.Dec. 944 (1987). Accordingly, a bystander may recover if injured by another's use of a defective product, so long as the presence of the bystander is reasonably foreseeable. *Schulz v. Rockwell Mfg. Co.*, 108 Ill.App.3d 113, 117, 438 N.E.2d 1230, 1232, 63 Ill.Dec. 867, 869 (2d Dist. 1982).

Damages

The plaintiff in a strict liability action may recover compensatory damages. Recovery in strict liability always has included damage to the product itself. *Suvada v. White Motor Co.*, *supra*. However, under the so-called "*Moorman*" doctrine (based on *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982)), a plaintiff cannot recover in tort for solely economic losses. In *Moorman*, the court defined economic loss as:

> damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property *** . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. 91 Ill.2d at 82, 435 N.E.2d at 449, 61 Ill.Dec. at 752.

The economic loss doctrine as stated in *Moorman* applies to negligence and strict liability cases. Accordingly, a homeowner cannot recover in tort for solely economic losses resulting from a homebuilder's negligence. *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990); *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983) (condominium

owners cannot recover economic losses from developer); *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982).

The *Moorman* doctrine applies even in the absence of an alternative remedy in contract. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986).

AFFIRMATIVE DEFENSES

Plaintiff's Contributory Fault--Assumption of the Risk

One of the refinements to the *Suvada* decision was made in *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983). Since it was "demanded by today's society" and in order to produce "a more just and socially desirable distribution of loss" in negligence actions, Illinois adopted the concept of the "pure form" of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Adopting the same reasoning which supported its decision in *Alvis*, and after determining that the vast majority of jurisdictions have found comparative fault theories to be applicable to strict liability cases, the Supreme Court in *Coney* adopted comparative fault principles in strict product liability actions. The Court specifically found that the application of comparative fault principles in a product liability action would not frustrate the Court's fundamental reasons for adopting strict product liability as set out in *Suvada*. *Coney v. J.L.G. Indus., Inc.*, *supra* at 116.

However, plaintiff's fault is a defense only if it constitutes assumption of the risk. Plaintiff's ordinary contributory negligence is not a defense to strict product liability when that negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. *Coney v. J.L.G. Indus., Inc.*, *supra* at 118-119. A consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect, as opposed to assuming a known risk, is not a defense to a strict product liability claim. *Id*.

The affirmative defense of assumption of the risk requires the defendant to prove that the plaintiff knew of the specific product defect, understood and appreciated the risk of injury from that defect, and nevertheless used the product in disregard of the known danger. *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 426-427 (1970) A user may assume a product is safe; however, if the user finds a defect and proceeds to use the product, the user assumes the risk of injury or property damage. The test of whether the plaintiff has assumed the risk is subjective; the conduct and knowledge of the plaintiff is at issue. The jury considers the plaintiff's age, experience, knowledge, understanding, and the obviousness of the defect in considering assumption of the risk. *Williams v. Brown Mfg. Co.*, *supra* at 430-431; *see Hanlon v. Airco Indus. Gases*, 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991); *Calderon v. Echo, Inc.*, 244 Ill.App.3d 1085, 1091,614 N.E.2d 140 (1st Dist. 1993).

Comparative fault principles apply to the plaintiff's assumption of the risk. *Coney v. J.L.G. Indus., Inc.*, *supra*. If plaintiff's fault in assuming the risk is 50% or less of the total fault that proximately caused the injury or damage, plaintiff's damages are reduced by that percentage. But under legislation enacted in 1986, the plaintiff is barred from recovery if the plaintiff's assumption of the risk is "more than 50% of the proximate cause of the injury or damage for which recovery is sought." 735 ILCS 5/2-1116; *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d

292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993).

Misuse--Foreseeable and Unforeseeable

"Misuse" has been defined as the use of a product for a purpose neither intended nor objectively foreseeable by a reasonably prudent manufacturer. *E.g., King v. Am. Food Equip. Co.*, 160 Ill.App.3d 898, 513 N.E.2d 958, 965, 112 Ill.Dec. 349, 356 (1st Dist. 1987). *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 119 (1983), in a phrase that has provided confusion, stated: "[h]owever, the defenses of misuse and assumption of the risk will no longer bar recovery."

Prior to *Coney*, an *unforeseeable* misuse of the product by the plaintiff was not recognized as an affirmative defense. The issue of unforeseeable misuse usually "arise[s] in connection with [the] plaintiff's proof of an unreasonably dangerous condition or in proximate causation, or both." *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 425, 261 N.E.2d 305 (1970) ("plaintiffs who 'misuse' a product--use it for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant--may be barred from recovery").

In *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 393 (7th Cir. 1990), the Seventh Circuit noted:

> Under Illinois law, misuse of a product is not an affirmative defense; rather, absence of misuse is part of plaintiff's proof of an unreasonably dangerous condition or of proximate cause. *Schwartz v. American Honda Motor Co., Inc.,* 710 F.2d 378, 381 (7th Cir. 1983), citing *Ill. State Trust Co. v. Walker Mfg. Co.,* 73 Ill.App.3d 585, 589, 29 Ill.Dec. 513, 516, 392 N.E.2d 70, 73 (1979).

In *Coney v. J.L.G. Indus., Inc.*, *supra,* the Supreme Court, referring to its *Williams* decision, said that "misuse" was a defense, and went on to hold that "misuse" would no longer bar recovery but rather would be incorporated into the concept of comparative fault. Importantly, the decision did not define "misuse," but its reference to the *Williams* decision leads to the conclusion that the court was referring to *unforeseeable* misuse.

In contrast to *unforeseeable* misuse, *foreseeable* misuse has never been a defense to a strict product liability action at all, since such a misuse, being foreseeable, does not affect the defendant's responsibility. The manufacturer of a product has always had the duty to furnish a product which is safe for *foreseeable* misuses, as well as for its intended uses. Spurgeon v. Julius Blum, Inc., 816 F. Supp. 1317 (C.D. Ill.1993).

Thus, the appellate court cases decided since *Coney* appear to conclude that the former rule--that *unforeseeable* misuse goes to the liability issue--has been replaced by the rule that *unforeseeable* misuse constitutes comparative fault, a damage-reducing factor. Several appellate court decisions have noted that misuse--defined as using the product for a purpose which is *neither* intended *nor foreseeable*--is an affirmative defense which operates to reduce the plaintiff's damages. *Arellano v. SGL Abrasives*, 246 Ill.App.3d 1002, 1010, 617 N.E.2d 130, 136, 186 Ill.Dec. 891, 897 (1st Dist. 1993) (finding of "misuse" vacated); *Varilek v. Mitchell Eng'g*

Co., 200 Ill.App.3d 649, 666-667, 558 N.E.2d 365, 377, 146 Ill.Dec. 402, 414 (1st Dist. 1990) (JNOV should have been entered on finding of "misuse"); *Suich v. H & B Printing Mach., Inc.*, 185 Ill.App.3d 863, 873-874, 541 N.E.2d 1206, 1212-13, 133 Ill.Dec. 768, 774-75 (1st Dist. 1989) (trial court properly refused to allow misuse as a defense); *Wheeler v. Sunbelt Tool Co., Inc.*, 181 Ill.App.3d 1088, 537 N.E.2d 1332, 1343, 130 Ill.Dec. 863, 874 (4th Dist. 1989).

Wheeler held:

> The issue of misuse traditionally arises in Illinois in conjunction with plaintiff's duty to prove an unreasonably defective product or proximate causation of the injury. See *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970). Prior to *Coney,* misuse was a complete defense to a strict liability action (*Coney,* 97 Ill.2d at 119, 73 Ill.Dec. at 343, 454 N.E.2d at 203-04), although it was not technically considered an affirmative defense. *Illinois State Trust Co. v. Walker Mfg. Co.*, 73 Ill.App.3d 585, 29 Ill.Dec. 513, 392 N.E.2d 70 (1979). However, some courts recognized misuse as an affirmative defense under certain circumstances. *Genteman v. Saunders Archery Co.*, 42 Ill.App.3d 294, 355 N.E.2d 647 (1976).

Dicta in *Lamkin v. Towner*, 138 Ill.2d 510, 531, 563 N.E.2d 449, 458, 150 Ill.Dec. 562, 571 (1990) commented that "neither a retailer nor a manufacturer can be held strictly liable for injuries resulting from the misuse of its product."

Introduction revised December 2007.

400.01 Strict Product Liability--Issues

[1]. The plaintiff claims that he was injured [while using] [as a result of the use of] the [product name, e.g. the hammer]. Plaintiff claims that there existed in the [product name] at the time it left the control of the defendant a condition which made the [product name] unreasonably dangerous in one or more of the following respects:

[*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the conditions which are claimed made the product unreasonably dangerous and which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[2]. The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control];

[that any of the claimed conditions existed in the [product name] at the time it was in its control];

[that any claimed condition of the [product name] made it unreasonably dangerous];

[that any claimed condition of the [product name] was a proximate cause of plaintiff's injuries]; [and]

[that plaintiff was injured to the extent claimed.]

[4]. [The defendant also claims that the plaintiff assumed the risk of injury in one or more of the following respects:
(Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of the risk on his part was a proximate cause of his injuries.]

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction must be modified to fit the allegations of the pleadings. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used as they apply to the particular case. Whenever required, variations consistent with the pleadings and proof should be used.

In a case where the product is not "in use" at the time of the occurrence, the word "by" may be substituted for the bracketed material on use in paragraph [1].

In the event there is an issue as to whether the defendant was in the business of supplying the particular product involved, the instruction must be modified by adding that particular element to the specific issues included in the instruction.

Fill in the blanks with the name of the product. In some cases, the product may be a component part.

In a wrongful death or survival action, substitute "decedent" (or "decedent's") or decedent's name in place of "plaintiff" (or "plaintiff's"), "his," "her," or "its" whenever appropriate.

Comment

An issues instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist. 1953), that the issues made by the pleadings be concisely stated without characterization and without undue emphasis.

The elements necessary to state a cause of action in strict product liability are set forth in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The plaintiff must prove that his injury and damage proximately resulted from a condition of the product, that the condition made the product unreasonably dangerous, and that the condition existed at the time the product left the defendant's control.

The term "condition" used in *Suvada* is employed in these instructions although some of the cases use the word "defect" instead of "condition." *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Wright v. Massey--Harris, Inc.*, 68 Ill.App.2d 70, 215 N.E.2d 465 (5th Dist. 1966); *Haley v. Merit Chevrolet*, 67 Ill.App.2d 19, 214 N.E.2d 347 (1st Dist. 1966). *Restatement (Second) of Torts* §402A (1965) speaks in terms of a "defective condition." The phrase "unreasonably dangerous" in the *Suvada* case is used in this instruction because it is conversational and free from any connotation of traditional concepts of fault that might arise from the use of the word "defect."

The phrase "unreasonably dangerous" has its origins in §402A of the *Restatement (Second) of Torts* (1965). Since the Illinois Supreme Court adopted the phrase in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), most Illinois reviewing courts have used that phrase. It is defined in IPI 400.06.

Dean Wade has suggested in Strict Tort Liability of Manufacturers, 19 S.W. L.J. 5, 15 (1965), that "the test of imposing strict liability is whether the product is unreasonably dangerous, to use the words of the Restatement. Somewhat preferable is the expression 'not reasonably safe.'" The Illinois Supreme Court in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 343, 247 N.E.2d 401, 403 (1969), quoted from Wade's article but did not adopt his suggestion. In *Rios v. Niagara Mach. & Tool Works*, 59 Ill.2d 79, 83, 319 N.E.2d 232, 235 (1974), the Court indicated that the terms "unreasonably dangerous" and "not reasonably safe" are interchangeable. However, the *Restatement*, and *Suvada* and all its progeny, furnish persuasive authority that the jury should be instructed that it is the "unreasonably dangerous" condition of the product which leads to liability. *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247, 250, 256, 259 (2007) again affirmed that the basis of strict product liability in Illinois is whether the product is "unreasonably dangerous."

400.01.01 Strict Product Liability--Issues--Non-Specific Defect

[1]. [Under Count __,] the plaintiff claims that he was injured [while using] [as a result of the use of] the [product name] and that there existed in the product at the time it left the control of the defendant a condition which made it unreasonably dangerous because

(a) [describe the occurrence, e.g., "In running off the road] the [product name] did not perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

[2]. The plaintiff further claims that the unreasonably dangerous condition of the [product] was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control;]

[that the [product] was in an unreasonably dangerous condition at the time it left the defendant's control;]

[that the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function;]

[that the plaintiff was using the [product] in a normal manner;]

[that there was no other reasonable cause of the product's failure to perform;]

[that any unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries], and

[that the plaintiff was injured to the extent claimed.]

[4]. [The defendant claims that the plaintiff assumed the risk of injury in one or more of the following respects:
(*Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of risk on his part was a proximate cause of his injuries.]

Instruction and Notes revised December 2007.

Notes on Use

IPI 400.01.01 (issues) and IPI 400.02.01 (burden of proof) should be given when the plaintiff does not allege a specific defect in the product but rather seeks to create the inference that the product was defective by direct or circumstantial evidence that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. Under such circumstances, plaintiff must also prove that there was no abnormal use of the product and that there was no secondary cause of the product's failure to perform properly. *Tweedy v. Wright Ford Sales*, 64 Ill.2d 570, 574, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976). The failure to instruct the jury about the plaintiff's burden to prove the absence of abnormal use and the absence of secondary causes has been held to be error. *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 378-379, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993).

See also the Notes on Use to IPI 400.01.

400.02 Strict Product Liability--Burden of Proof

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction is designed to be used with IPI 400.01.

See Notes on Use to IPI 400.01. The bracketed material in the introductory paragraph must be used when plaintiff claims, and there is evidence tending to show, that more than one condition rendered the product unreasonably dangerous.

IPI 21.01 (Meaning of Burden of Proof) should be given with this instruction.

In a wrongful death or survival action, substitute “decedent” (or “decedent's”) or decedent's name in place of “plaintiff” (or “plaintiff's”), “his,” “her,” or “its” whenever appropriate.

Comment

See Comment to IPI 400.01.

400.02.01 Strict Product Liability--Burden of Proof--Non-Specific Defect

[Under Count __], The plaintiff has the burden of proving each of the following propositions:

First, that there existed in the [product] a condition which made the [product] unreasonably dangerous because

(a) [describe the occurrence, e.g., "In running off the road"] the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

Second, that the condition existed at the time the [product] left the control of the defendant;

Third, that the plaintiff was injured; and

Fourth, that the unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes revised December 2007.

Notes on Use

Use with IPI 400.01.01 and IPI 21.01.

B400.02.01 Strict Product Liability--Burden of Proof--Assumption of Risk

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant. But if, on the other hand, you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff assumed the risk of injury.

As to that claim, the defendant has the burden of proving each of the following propositions:

A: That the plaintiff had actual knowledge of the condition which the plaintiff claims made the [product] unreasonably dangerous;

B: That the plaintiff understood and appreciated the risk of injury from that condition and [proceeded] [continued] to use the [product];

C: That the condition known to plaintiff was a proximate cause of the plaintiff's claimed [injury] [damage].

[However, the plaintiff's inattentive or ignorant failure to discover or guard against the unreasonably dangerous condition of the [product] does not constitute assumption of the risk.]

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved all of the propositions required of the defendant, then your verdict should be for the plaintiff and the plaintiff's damages will not be reduced.

If you find from your consideration of all the evidence that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the defendant.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the [injury] [damage] for which recovery is sought, then your verdict should be for the plaintiff and the plaintiff's damages will be reduced by the percentage of the plaintiff's fault in assuming the risk.

If you find that the plaintiff's [injury] [damage] was proximately caused by an unreasonably dangerous condition of the product and if you also find that the plaintiff assumed the risk of his injury, you will determine the plaintiff's proportion or percentage of the total fault by comparing the extent to which the plaintiff's assumption of the risk and the conduct of [other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage]. If you determine the plaintiff's percentage of the total fault was 50% or less, you will write that percentage on the appropriate line on your verdict form.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This should be used with IPI 400.01 and IPI 21.01.

If there is no issue of assumption of risk, IPI 400.02 should be used instead of this instruction.

If the case involves an affirmative defense (other than assumption of risk), this instruction (as well as IPI 400.01) should be modified as appropriate to include that defense.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

The bracketed portion of the last paragraph should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

The bracketed paragraph following paragraph C should be used when there is evidence of the plaintiff's negligent failure to discover the defect and the court determines that the paragraph will assist the jury in its determination of this issue.

Comment

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability, and therefore the jury must be instructed in accordance with §2-1107.1 (735 ILCS 5/2-1107.1) that the defendant shall be found not liable if the plaintiff's contributory fault (which includes assumption of the risk) exceeds 50% of the total fault proximately causing plaintiff's injury.

B400.03. Strict Product Liability--Assumption of Risk--Damage Reduction

If you find that the plaintiff's injury was proximately caused by an unreasonably dangerous condition of the [product], and if you also find that the plaintiff assumed the risk of his injury, and if you further find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, you must then determine the amount of damages to be awarded by you [under Count _] as follows:

First, determine the total amount of damages to which the plaintiff would be entitled under the court's instructions if the plaintiff had not assumed the risk;

Second, determine what portion or percentage is attributable solely to the plaintiff's fault in assuming the risk, considering the extent to which the plaintiff's assumption of risk, [the conduct of other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage];

Third, reduce the total amount of the plaintiff's damages by the proportion or percentage of plaintiff's assumption of the risk.

The resulting amount, after making such reduction, will be the amount of your verdict [under Count _].

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction together with IPI B400.02.01 should be given in all cases where assumption of the risk of the plaintiff is an issue.

The bracketed portion of paragraph "Second" should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

In a wrongful death or survival action, substitute "decedent" (or "decedent's") or decedent's name in place of "plaintiff" (or "plaintiff's"), "his," "her," or "its" whenever appropriate.

Comment

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability.

400.04 Strict Product Liability–Proximate Cause–Definition

When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]

Instruction and Notes on Use revised September 2015.

Notes on Use

This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death. In cases where there is no evidence that the conduct of any person other than a single defendant was a concurring or contributing cause, the short version without the bracketed material may be used.

Comment

The unreasonably dangerous condition must be a proximate cause of the plaintiff's injury or damage. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); Restatement (Second) of Torts §402A (1965). On proximate cause, *see* Comment to IPI 15.01.

400.05 Strict Product Liability--Assumption of Risk--Factors To Be Considered

The committee recommends that no instruction be given on the evidentiary factors to be considered in determining whether the plaintiff has assumed the risk.

Instruction and Comment revised December 2007.

Comment

The test to be applied in determining the question of whether a plaintiff had the requisite knowledge of the danger is fundamentally a subjective test. It is the knowledge, understanding and appreciation of the particular plaintiff which is in issue and not that of the "reasonable man."

In considering the propositions of whether the particular plaintiff knew of the condition, understood and appreciated the risk of injury, and proceeded to encounter the danger, the jury may consider evidence in addition to the plaintiff's own testimony as to his state of mind. The fact finder is not compelled to accept as true the statements of the plaintiff regarding his state of mind, but may consider all of the facts established by the evidence, including "the factors of the [plaintiff's] age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses." *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill.2d 64, 264 N.E.2d 170 (1970); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 431, 261 N.E.2d 305, 312 (1970).

However, an instruction which states that the law does not require the jury to rely upon the plaintiff's statements but may consider other factors should not be given because it unduly emphasizes certain evidence and is argumentative. Such an instruction would unnecessarily emphasize evidence relating to the user's age, experience, knowledge and understanding, as opposed to the plaintiff's testimony concerning his subjective state of mind.

While the user's age, experience, knowledge and understanding are relevant facts for the jury to consider, the subject is properly left to argument and to other instructions: IPI 3.04 (former IPI 1.04) instructs the jury as to the effect of circumstantial evidence; IPI 1.01 (former IPI 2.01) instructs the jury on the standards to be used in assessing credibility, advises the jurors that they are the triers of the facts, and advises them that they are to use common sense in evaluating what they see and hear during trial.

400.06 Strict Product Liability—Definition Of "Unreasonably Dangerous"

When I use the expression "unreasonably dangerous" in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product].

Instruction, Notes and Comment revised December 2007.

Notes on Use

In *Lamkin v. Towner*, 138 Ill.2d 510 (1990), the Supreme Court recognized an alternative test for plaintiff to prove a strict product liability test: the "risk-utility" test. The plaintiff has the option to prove the case under either the "consumer expectation" or the "risk-utility" test. *Lamkin v. Towner*, *supra* at 529; *Hansen v. Baxter Healthcare Corp.*, 309 Ill.App.3d 869, 885, *aff'd* 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247 (2007); *Mikolajczyk v. Ford Motor Co.*, 374 Ill.App.3d 646 (1st Dist. 2007), *rev'd & remanded*, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329, 2008 Ill. LEXIS 1424 (2008). In *Hansen*, *Mikolajczyk*, *and Carrillo v. Ford Motor Co.*, 325 Ill.App.3d 955 (1st Dist. 2001), the plaintiff opted to have the jury instructed using this instruction, what is commonly labeled the "consumer expectation" test. The instructions were approved in *Hansen*, *Mikolajczyk*, and *Carrillo*. An issue before the Supreme Court in *Mikolajczyk* was whether this instruction should be used in a strict liability design defect case.

Comment

The expression "unreasonably dangerous" first found acceptance in Illinois in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The Court noted that its decision coincided with the views expressed in *Restatement (Second) of Torts* §402A. The phrase "unreasonably dangerous" has found common, though not universal, acceptance in subsequent decisions. *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969); *Fanning v. LeMay*, 38 Ill.2d 209, 230 N.E.2d 182 (1967). Although arguments have been advanced that the phrase "not reasonably safe" is preferable to the term "unreasonably dangerous," the latter term has been employed in these instructions for the reasons discussed in the Comment to IPI 400.01.

The phrase "unreasonably dangerous condition" is used in these instructions instead of the words "defect" or "defective condition" because the phrase is more conversational and is less likely to suggest traditional concepts of fault to the jurors.

The clearest expression of the concepts involved in these terms appears in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 342, 247 N.E.2d 401, 403 (1969):

> Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.

See also Hepler v. Ford Motor Co., 27 Ill.App.3d 508, 517, 327 N.E.2d 101, 108 (5th Dist. 1975).

The correlation between "unreasonably dangerous" and "unsafe" was recognized in *Dunham v.*

Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969) when the Court approved Dean Prosser's statement that a product is defective "if it is not safe for such a use that can be expected to be made of it." *Id.* at 343, 247 N.E.2d at 403. "Unsafe" has been used in this instruction to express the concepts of "dangerous" and "defective" used in the *Dunham* definition.

This instruction omits the word "intended" from the *Dunham* definition as a modifier of the product's function. It is clear that the test of the product's function is objective in nature and is not controlled by, or limited to, uses which the manufacturer intended. To use the word "intended" would invite the jury to apply a subjective standard. *See Winnett v. Winnett*, 57 Ill.2d 7, 11, 310 N.E.2d 1, 4 (1974).

Under this instruction a product can be "unreasonably dangerous" only when put to a use that is reasonably foreseeable. *Winnett v. Winnett*, *supra* at 11, 310 N.E.2d at 4. This instruction would bar recovery where the injury was proximately caused by the plaintiff's unforeseeable misuse of the product. "Misuse" is a use which is neither intended nor reasonably foreseeable. *Williams*, *supra* at 425, 261 N.E.2d at 309. *See* Comment, IPI 400.08.

An instruction defining "unreasonably dangerous" is needed because the concept is not generally understood by, nor within the common experience of, jurors. The term is comparable in complexity to "proximate cause" (IPI 15.01); "willful and wanton conduct" (IPI 14.01); "assumption of risk" (IPI 13.01, 13.02); "negligence" (IPI 10.01); and "ordinary care" (IPI 10.02). *Becker v. Aquaslide 'N Dive Corp.*, 35 Ill.App.3d 479, 490, 341 N.E.2d 369, 377 (4th Dist. 1975). *But see Pyatt v. Engel Equip., Inc.*, 17 Ill.App.3d 1070, 1074, 309 N.E.2d 225, 229 (3d Dist. 1974).

400.06A Strict Product Liability--Definition of "Unreasonably Dangerous"--Risk-Utility Test--Design Defects

When I use the expression "unreasonably dangerous," I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product.

Instruction, Notes on Use and Comment created May 2009.

Notes on Use

This instruction is an alternative to IPI 400.06 for use in strict product liability trials. This instruction is new, and states the risk-utility test for proving a strict product liability design defect case.

The need for this instruction was required by the Supreme Court in *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516 (2008). The court held that if there is risk-utility evidence admitted in a design defect case, even if a party presents evidence to support the consumer expectation test, a risk-utility instruction should be given instead of IPI 400.06.

Comment

Since *Mikolajczyk* did not expressly overrule any prior decisions, the Committee has attempted to synthesize the opinion in *Mikolajczyk* with *Lamkin v. Towner*, 138 Ill.2d 510 (1990), *Hansen v. Baxter Healthcare Corporation*, 198 Ill.2d 420 (2002), and *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247 (2007). In the latter three cases, the Supreme Court recognized that the "risk-utility" test was an alternative to the "consumer expectation" test set forth in IPI 400.06.

Lamkin, *supra* at 529, Hansen, *supra* at 433, and *Calles*, *supra* at 255-256, specifically held:

> A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

The Committee considered whether to list a number of factors for the jury to use in determining whether a product is unreasonably dangerous under the risk-utility test. The Committee declined to do so for a number of reasons. Most of the risk-utility factors discussed in various decisions have their genesis in law review articles authored by Professor John Wade. See *Calles v. Scripto-Tokai*, 224 Ill.2d 247, 264-265 (2007). Professor Wade addressed whether those factors should be listed in a jury instruction in *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 840 (1973) and said they should not, reasoning as follows:

> Should the jury be told about the list of seven factors which were set forth above? The answer should normally be no. The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, described it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements. [citation omitted]. This analysis is most helpful and can be used with profit by trial and

> appellate judges, and by students and commentators. But it is not ordinarily given to the jury. Instead they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances.

See also Wade, *On Product Design Defects and their Actionability*, 33 Vand.L.Rev. 551, 573 (1980), "[t]he precise wording of the instruction is important and any list of abstract factors of different types is likely to confuse a jury."

Our decision not to list factors for the risk-utility test is also supported by the Oregon Supreme Court, *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1040 n.15 (1974); the Arizona Civil Jury Instructions Committee of the State Bar of Arizona, *RAJI (Civil) PLI 3 Use Note*; the Colorado Supreme Court Committee on Civil Jury Instructions, *Jury Instr. Civil 14:3 (4th ed.)*; *Turner v. General Motors*, 584 S.W.2d 844, 849-850 (Tex. 1979) and Florida, *JI-CIV-FL-CLE PL 5 (October 2004)*.

When it comes to determining liability issues in tort cases, it has long been the Committee's practice not to include a list of factors because doing so would unduly highlight certain aspects of the evidence in a case or would appear to argue for one side or the other. *IPI (Civil), Foreword to the 1st Edition, XXII (2006)*. Good examples of the Committee's practice in not listing factors in liability instructions that have been approved by Illinois courts are: 10.01, negligence, *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 285 (2002); 11.01, contributory negligence, *Blacconeri v. Aguayo*, 132 Ill.App.3d 984, 990-991 (1st Dist. 1985); 14.01, willful and wanton conduct, *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 241 (2007); 180.16, having "charge of" the work under the Structural Work Act, *Larson v. Commonwealth Edison*, 33 Ill.2d 316, 321, 323 (1965) and *Thompson v. MCA Distributing Music Corp. of America*, 257 Ill.App.3d 988, 990 (5th Dist. 1994); 100.01, highest duty of care of common carrier, *Manus v. Trans States Airlines, Inc.*, 359 Ill.App.3d 665, 667 (5th Dist. 2005); 120.01, trespasser definition, *Eshoo v. Chicago Transit Authority*, 309 Ill.App.3d 831, 837 (1st Dist. 1999); and 150.15, intoxication, *Navarro v. Lerman*, 48 Ill.App.2d 27, 36 (1st Dist. 1964).

Evidence will determine what the risks and benefits of a design are. Counsel can argue all of the admissible risks and benefits to the jury and a list of factors would not be a helpful addition to the instruction. A list could also mislead or confuse a jury since the presence of one factor favoring one party can outweigh multiple factors that favor the other party. *Calles*, *supra* at 266-267. As the Court also noted, the lists of factors which courts may consider when assessing risk-utility are not exclusive. *Calles*, *supra* at 266.

400.07A Strict Product Liability--Duty

The Committee recommends that no instruction concerning the duty of strict product liability of defendants be given, except in cases where IPI 400.07B, 400.07C, or 400.07D are applicable.

Instruction and Comment revised December 2007.

Comment

In strict product liability cases, the focus of the liability question is the *condition of the product*, not the conduct of the defendant. *Cf.* IPI 400.01, 400.02. Instructing a jury on a defendant's duty in this context would distract the jury from its true role: to determine whether or not the condition of the product was unreasonably dangerous. "It is preferable to avoid reference to 'duty' and maintain the focus on the defective character of the product . . . ." *Lundy v. Whiting Corp.*, 93 Ill.App.3d 244, 252, 48 Ill.Dec. 752, 417 N.E.2d 154 (1st Dist. 1981); *accord Wilson v. Norfolk & W. Ry. Co.*, 109 Ill.App.3d 79, 97, 64 Ill.Dec. 686, 440 N.E.2d 238 (5th Dist. 1982); *Carillo v. Ford Motor Co*, 325 Ill.App.3d 955, 259 Ill.Dec. 619, 759 N.E.2d 99 (1st Dist. 2001).

400.07B Strict Product Liability--Duty To Warn--Learned Intermediary Doctrine

The [type of product, e.g. drug] involved in this case can only be obtained with a prescription from a physician. For this reason, the [type of defendant, e.g. manufacturer] has a duty to adequately warn only [the learned intermediary involved] of the [dangers][potential adverse reactions] of which it knew, or in the exercise of ordinary care should have known, at the time the [product] left the [defendant's] control. The [defendant] has no duty to warn the [consumer][user] directly.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should be given only in cases involving prescription pharmaceuticals and other products to which the "learned intermediary" doctrine applies to limit the manufacturer's duty to warn. The manufacturer in such cases has only a duty to warn the "learned intermediary" such as a physician; it has no duty to warn the consumer directly. IPI 10.02, defining "ordinary care," should be given with this instruction.

Comment

The learned intermediary doctrine was applied in *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 523-524, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987) (drugs) and in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 432, 261 Ill.Dec. 744, 764 N.E.2d 35 (2002) (Luer-lock catheter). The learned intermediary doctrine was not applicable in *Friedl v. Airsource, Inc.*, 323 Ill.App.3d 1039, 257 Ill.Dec. 459, 753 N.E.2d 1085 (1st Dist. 2001) (hyperbaric oxygen chamber).

400.07C Strict Product Liability--Non-Delegable Duty

Defendant[s] [name[s]] has [have] the duty to manufacture and sell a product that is not in an unreasonably dangerous condition. That duty cannot be delegated to another. It is not a defense for the defendant[s] [name[s]] that another person [,including plaintiff's employer,] failed to make the product free from unreasonably dangerous conditions. When I use the phrase "cannot be delegated," I mean that the duty must be performed by defendant[s] [name[s]] and cannot be left to some other person or entity.

Instruction, Notes and Comment revised December 2007

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Notes on Use

This instruction may be used in cases where the product manufacturer seeks to avoid liability with evidence that the owner of the product, such as a plaintiff's employer, selected features of the product. No court of review has approved the use of this instruction in other contexts.

Comment

This instruction was approved in *Turney v. Ford Motor Co.*, 94 Ill.App.3d 678, 685, 50 Ill.Dec. 85, 418 N.E.2d 1079 (1st Dist. 1981).

400.07D Strict Product Liability--Duty To Warn--General

The [manufacturer] [other] has a duty to adequately warn [and instruct] the [consumer] [user] about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the [manufacturer's] [other's] control.

Instruction, Notes and Comment revised December 2007.

Notes on Use

In cases where this instruction applies, it is intended to be used with IPI 400.01 and 400.02. IPI 10.02, defining "ordinary care," should be given with this instruction.

Comment

This principle of law was established in *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 35, 37 Ill.Dec. 304, 402 N.E.2d 194 (1980). The Court has not retreated from its requirements since then.

400.08 Strict Product Liability--Personal Injury--Misuse

The committee recommends that no instruction on misuse of the product be given.

Instruction and Comment revised December 2007.

Comment

The committee's recommendation that no instruction be given on the question of misuse is predicated upon the committee's assumptions stated in the introduction to this 400 Series of instructions.

If subsequent case decisions prove that these assumptions of the committee are erroneous, then, in that event, instructions to the jury on the issue of misuse may be appropriate.

400.09 Strict Product Liability--Personal Injury--Liability of Non-Manufacturer

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense

[1]. [that the defendant, [name of seller, distributor, assembler, etc.], did not create the condition which rendered the [product, e.g. hammer] unreasonably dangerous] [and]

[2]. [that the condition of the [product, e.g. hammer] existed before the [product, e.g. hammer] came under the control of the defendant [name of seller, distributor, bailor, etc.].

Instruction, Notes and Comment revised December 2007.

Notes on Use

Use this instruction only in a case where a non-manufacturer, such as a retailer, distributor, assembler or other party intermediary between the creator of the condition and the plaintiff, is a defendant. Select the appropriate bracketed material. For example, use of the first bracketed paragraph is indicated when an assembler or a distributor of an unpackaged product is a defendant.

Comment

Sweeney v. Matthews, 94 Ill.App.2d 6, 236 N.E.2d 439 (1st Dist. 1968), *aff'd*, 46 Ill.2d 64, 264 N.E.2d 170 (1970), rejects the proposition that a retailer is not subject to the same liability as a manufacturer and embraces the rationale set forth in *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 262, 391 P.2d 168, 171, 37 Cal.Rptr. 896, 899 (1964):

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citations omitted]. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff . . . .

But see Introduction concerning statutory limitations on a retailer's liability, 735 ILCS 5/2-621.

400.10 Strict Product Liability--Due Care Not A Defense

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense [that the condition of the product could not have been discovered by the defendant] [or] [that care was used in the manufacture of the product].

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should not be given if plaintiff's claim of liability is failure to warn. *Cf.* IPI 400.07D. Use this instruction if the jury heard from suggestion, evidence, or argument that the defendant exercised care in the manufacturing process or could not discover the condition of the product.

Comment

The due care of the defendant, or the inability of the defendant to discover a dangerous condition in the product, is not a defense. *Cunningham v. MacNeal Mem'l Hosp.*, 47 Ill.2d 443, 266 N.E.2d 897 (1970); Gelsumino v. E.W. Bliss Co., 10 Ill.App.3d 604, 295 N.E.2d 110 (1st Dist. 1973).

400.11 Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (*see Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. *See* IPI Chapter 45 and IPI 600.14.

400.12 Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff Against Some Defendants

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (*see Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. *See* IPI Chapter 45 and IPI 600.14.

Illinois Official Reports

Appellate Court

***Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168**

Appellate Court Caption	GERALD DUNNING, Plaintiff-Appellee, v. DYNEGY MIDWEST GENERATION, INC., a Corporation, and AVI INTERNATIONAL, INC., Defendants and Third-Party Plaintiffs-Appellants (Power Maintenance Constructors, Inc., Third-Party Defendant-Appellee).
District & No.	Fifth District Docket No. 5-14-0168
Filed Rehearing denied	April 28, 2015 June 22, 2015
Decision Under Review	Appeal from the Circuit Court of St. Clair County, No. 08-L-2; the Hon. Andrew J. Gleeson, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James L. Hodges, of Hennessy & Roach, P.C., of St. Louis, Missouri, for appellant Dynegy Midwest Generation, Inc. Loretta M. Griffin and Ana Maria L. Downs, both of Law Offices of Loretta M. Griffin, of Chicago, for appellant AVI International, Inc. Thomas Q. Keefe, Jr., and Thomas Q. Keefe III, both of Keefe & Keefe, P.C., of Belleville, for appellee.

Panel JUSTICE GOLDENHERSH delivered the judgment of the court, with opinion.
Justices Stewart and Schwarm concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Gerald Dunning, was crushed between a steel I-beam support and a portion of a 28,500-pound water pump being transported on a cart pushed by a forklift. Defendant Dynegy Midwest Generation, Inc. (DMG), owned the water pump, and the cart transporting the pump was pushed by a forklift owned and operated by DMG. The cart was designed and maintained by defendant AVI International, Inc. (AVI). Plaintiff was employed as a pipefitter by third-party defendant Power Maintenance Constructors, Inc. (PMC), which was contracted to provide the labor services for the project. Plaintiff brought separate claims against defendants DMG and AVI for injuries sustained in the incident, and the trial court found in favor of plaintiff. Defendants timely appealed. We affirm.

¶ 2 BACKGROUND

¶ 3 Prior to October 8, 2007, DMG contracted with fellow defendant, AVI, and third-party defendant, PMC, to perform tasks at its Baldwin Power Plant. One of the assigned tasks involved removing a circulating water pump from its casing and out of the power plant.

¶ 4 DMG was in charge of the power plant at the time in question. AVI was contracted to supervise the removal, transfer, loading, and transportation of circulating water pumps from DMG's power plant to AVI's facility in Connecticut for repair and maintenance. AVI also provided a cart that was designed for the purpose of transporting the water pumps. AVI's cart was designed and manufactured by AVI's president, Clifford Burrell, and was designed so that one person could push the cart across a flat concrete floor with a load of up to 40,000 pounds. PMC was contracted to provide the labor for the project, which was performed by plumbers and pipefitters. Plaintiff was employed by PMC as a union pipefitter for the project.

¶ 5 The events surrounding plaintiff's accident are as follows. On October 8, 2007, plaintiff was assisting in the removal of a 28,500-pound water pump at DMG's Baldwin Power Plant. DMG's water pump was lowered from its position and placed onto AVI's cart by PMC employees. Scott Docimo, AVI's only employee on-site at the time of the incident, watched as PMC employees rigged the pump to AVI's cart and a forklift owned and operated by DMG. Docimo recognized that the PMC employees had improperly rigged the pump and cart to DMG's forklift but did not say anything.

¶ 6 As the forklift began to slowly push the cart forward across a flat concrete floor, it began to veer off its intended path. The wheels on AVI's cart were going in different directions, and the cart was veering from side to side. In an attempt to keep the cart moving straight, PMC employees used their hands to guide the cart. As the PMC employees were pushing on the

sides of the cart and pump to keep it moving straight, plaintiff was crushed between a portion of the pump and a steel I-beam support, sustaining serious injuries.

¶ 7 On January 4, 2008, plaintiff brought suit against DMG alleging negligence pursuant to section 414 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 414 (1965)). Plaintiff alleged that while he was in the course of his employment as a pipefitter for PMC at DMG's power plant, he was crushed into a steel post by a forklift owned and operated by DMG.

¶ 8 On October 1, 2008, plaintiff filed a first amended complaint adding AVI as a defendant, asserting a single count of negligence against AVI. Plaintiff alleged AVI negligently instructed rigging of the pump, failed to provide training and instruction in the safe operation of forklifts, and failed to inspect the area to ensure safe forklift operation. AVI filed an answer denying all material allegations of negligence and filed a third-party complaint against PMC alleging PMC negligently failed to maintain a lookout for dangers posed to plaintiff in the area it instructed plaintiff to work, failed to inspect plaintiff's surroundings, failed to notify or warn plaintiff of potential dangers, failed to instruct and train plaintiff in his work, and failed to coordinate plaintiff's work with other trades and entities present.

¶ 9 Plaintiff filed a second amended complaint on November 4, 2013, adding a strict product liability count against AVI alleging AVI's cart was defective at the time of the accident. On November 13, 2013, AVI filed a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) contesting the legal and factual sufficiency of plaintiff's complaint, a motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)) asserting statutes of limitation and repose defenses, and a motion to continue trial. The trial court denied all three motions, and the matter proceeded to trial on November 18, 2013.

¶ 10 Several witnesses testified for plaintiff and defendants at trial. At the close of plaintiff's evidence, DMG moved for a directed verdict asserting plaintiff failed to show DMG owed a duty of care to plaintiff or that it was negligent. The trial court denied DMG's motion. Also at the close of plaintiff's evidence, the trial court directed a verdict against AVI on the counts of negligence and strict product liability. The trial court established that as a matter of law, AVI's cart was defective and a proximate cause of plaintiff's injuries.

¶ 11 On November 22, 2013, the jury returned a verdict finding plaintiff comparatively negligent, finding against DMG and AVI, and finding against PMC on the third-party claims. The following percentages of fault were assessed: plaintiff 6%, AVI 37%, DMG 47%, and PMC 10%. On December 18, 2013, the trial court entered judgment on the verdict rendered against DMG, AVI, and PMC. DMG and AVI timely filed posttrial motions, each moving for a judgment notwithstanding the verdict or in the alternative for a new trial, and AVI also moving to vacate the order of judgment and set aside the directed verdict entered in favor of plaintiff and against AVI. These posttrial motions were denied. Defendants DMG and AVI timely filed notices of appeal.

¶ 12 ANALYSIS

¶ 13 There are numerous issues raised by defendants on appeal. We first address the issues raised by DMG and then address the issues raised by AVI.

¶ 14 I. DMG

¶ 15 DMG alleges the trial court erred in denying its motion for a directed verdict, judgment notwithstanding the verdict, and motion for a new trial on the grounds that plaintiff failed to show DMG owed plaintiff a duty of care and failed to prove DMG's alleged negligence proximately caused plaintiff's injuries. DMG contends the evidence at the close of plaintiff's case overwhelmingly favored DMG.

¶ 16 A trial court's denial of a motion for a directed verdict or a judgment notwithstanding the verdict is reviewed *de novo*. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650, 924 N.E.2d 531, 542 (2010). A directed verdict or judgment notwithstanding the verdict is proper where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could ever stand. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542. In ruling for a directed verdict or judgment notwithstanding the verdict, the court does not weigh the evidence and is not concerned with the credibility of the witnesses. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542. The "court may only consider the evidence, and any rational inferences therefrom, in the light most favorable to the nonmoving party." *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542.

¶ 17 Further, a judgment notwithstanding the verdict may not be granted merely because the court determines a verdict is against the manifest weight of the evidence. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542. A trial court has no right to enter a judgment notwithstanding the verdict if there is any evidence showing a substantial factual dispute or where the assessment of the witnesses' credibility or the determination regarding conflicting evidence is decisive to the outcome of the trial. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542-43.

¶ 18 Alternatively, on a motion for a new trial, the court will weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Ford*, 398 Ill. App. 3d at 651, 924 N.E.2d at 543. Hence, the standard to be used in determining whether to grant a new trial is whether the jury's verdict was against the manifest weight of the evidence. *Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 569, 851 N.E.2d 866, 875 (2006).

¶ 19 A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence. *Kindernay*, 366 Ill. App. 3d at 569, 851 N.E.2d at 875. A trial court's ruling on a motion for a new trial will not be reversed except in instances where it is affirmatively shown that the trial court clearly abused its discretion, as the trial judge had the benefit of observing the witnesses firsthand at trial. *Maple v. Gustafson*, 151 Ill. 2d 445, 455-56, 603 N.E.2d 508, 513 (1992). In determining whether the trial court abused its discretion, we must consider whether the verdict was supported by the evidence and whether the losing party was denied a fair trial. *Ford*, 398 Ill. App. 3d at 651, 924 N.E.2d at 543.

¶ 20 At the close of plaintiff's case, DMG moved for a directed verdict asserting it was not negligent because (1) plaintiff failed to show defendant owed plaintiff a duty and (2) plaintiff failed to establish DMG was a proximate cause of plaintiff's injuries. After the trial court denied DMG's motion for a directed verdict, DMG filed a posttrial motion for a judgment notwithstanding the verdict or in the alternative for a new trial, which the trial court denied. For the following reasons, we find the trial court did not err in denying DMG's motion for a directed verdict and judgment notwithstanding the verdict or DMG's motion for a new trial.

¶ 21 Before we begin our analysis, it should be noted that the existence of a duty is a question of law to be determined by the court, and questions concerning a breach of that duty and proximate cause of the injury are questions reserved for the trier of fact. *Jones v. Chicago & Northwestern Transportation Co.*, 206 Ill. App. 3d 136, 139, 563 N.E.2d 1120, 1122 (1990).

¶ 22 A. Duty of Care

¶ 23 Whether a duty exists is a question of law for the court to decide. *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 227, 665 N.E.2d 1260, 1267 (1996). In resolving whether a duty exists, a court must determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one party for the benefit of the other. *Rhodes*, 172 Ill. 2d at 227, 665 N.E.2d at 1267.

¶ 24 The duty inquiry involves four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226, 938 N.E.2d 440, 447 (2010).

¶ 25 As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the latter. *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 838, 719 N.E.2d 174, 176 (1999). However, section 414 of the Restatement (Second) of Torts provides an exception to the general rule:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965).

Gregory v. Beazer East, 384 Ill. App. 3d 178, 186, 892 N.E.2d 563, 572-73 (2008).

¶ 26 Thus, whether a duty exists under section 414 turns on whether the defendant controls the work in such a manner that he should be held liable. *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 315, 807 N.E.2d 480, 489 (2004). The comments accompanying section 414 discuss a continuum of control which our courts have used to determine the necessary degree of control a defendant must exercise to be subject to liability under this section. Comment c provides:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414 cmt. c (1965).

Gregory, 384 Ill. App. 3d at 187, 892 N.E.2d at 573.

¶ 27 Moreover, a possessor of land owes its invitees a common law duty of reasonable care in maintaining its premises in a reasonably safe condition. *Gregory*, 384 Ill. App. 3d at 191, 892

N.E.2d at 576. No legal duty arises unless the harm is reasonably foreseeable. *Gregory*, 384 Ill. App. 3d at 191, 892 N.E.2d at 576.

¶ 28 Section 343 of the Restatement (Second) of Torts provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965).

Gregory, 384 Ill. App. 3d at 191, 892 N.E.2d at 576.

¶ 29 In the instant case, a DMG employee was operating a forklift owned by DMG and drove the forklift into a steel beam with plaintiff in front of the forklift, thereby crushing plaintiff between the forklift and steel beam. This accident occurred on premises owned by DMG. From these facts, the jury determined DMG's conduct was negligent and the proximate cause of plaintiff's injuries.

¶ 30 DMG asserts plaintiff's injury was not reasonably foreseeable because it was the independent contractors AVI and PMC that provided the defective cart and improperly rigged the cart to DMG's forklift, thereby creating a condition DMG could not guard against as the owner of the premises. We disagree.

¶ 31 The accident in this case occurred at a facility owned, operated, and maintained by DMG. Plaintiff and his fellow PMC laborers worked with one of DMG's employees in rigging DMG's pump to a forklift owned by DMG. DMG's operator then pushed the forklift carrying the pump down a corridor, completely controlling the load and direction of the forklift.

¶ 32 Plaintiff's injury was foreseeable, as DMG's operator should have anticipated that plaintiff's injuries would result from the operator driving the forklift into a steel beam with plaintiff in front of the forklift. DMG completely controlled the forklift, owned the pump that crushed plaintiff into the steel beam, and owned the premises on which the accident occurred. Accordingly, DMG owed plaintiff a duty of reasonable care.

¶ 33 B. Proximate Cause

¶ 34 DMG also alleges its operator of the forklift and the forklift itself were not the proximate cause of plaintiff's accident. DMG argues the proximate cause of the accident was AVI's defective cart and PMC's failure to properly rig the pump to AVI's cart and DMG's forklift.

¶ 35 Proximate cause is defined as " 'any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.' " *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 133, 679 N.E.2d 1202, 1219 (1997) (quoting Illinois Pattern Jury Instructions, Civil, No. 15.01 (1995) (hereinafter, IPI Civil (1995))).

¶ 36 Two tests are generally applied in determining the issue of proximate cause. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876. The first is the substantial-factor test, under which

the defendant's conduct is a cause of an event if it was a material element and a substantial factor in bringing it about. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876. Under the second test, commonly referred to as the "but for" rule, the defendant's conduct is not a cause of an event if the event would have occurred without it. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876. The plaintiff bears the burden of establishing proximate cause by a preponderance of the evidence. *Kindernay*, 366 Ill. App. 3d at 570, 851 N.E.2d at 876.

¶ 37 If a jury finds that the defendant's negligence was a proximate cause of the plaintiff's injury, it is no defense that something else may also have been a cause of the injury. *Holton*, 176 Ill. 2d at 133, 679 N.E.2d at 1219. The "verdict should be for defendant if the jury decides 'that the *sole* proximate cause of injury to the plaintiff was *something* other than the conduct of the defendant.' " (Emphases in original.) *Holton*, 176 Ill. 2d at 133, 679 N.E.2d at 1219 (quoting IPI Civil (1995) No. 12.05).

¶ 38 DMG indicates there can be more than one negligent act that creates the proximate cause of an injury. *Long v. Friesland*, 178 Ill. App. 3d 42, 55, 532 N.E.2d 914, 922 (1988). When an injury is caused by the concurrent negligence of two parties and the accident would not have occurred without the negligence of both, each party is a proximate cause of the injury. *Long*, 178 Ill. App. 3d at 55, 532 N.E.2d at 922.

¶ 39 However, as DMG points out, if the "alleged negligent act did nothing more than furnish a condition making the injury possible through the subsequent independent negligent act of a third party, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." *Long*, 178 Ill. App. 3d at 55, 532 N.E.2d at 922. The test used to determine whether both acts constitute concurrent proximate cause is whether the first wrongdoer may have reasonably anticipated or foreseen the intervening cause as a natural and probable result of the first wrongdoer's negligence. *Long*, 178 Ill. App. 3d at 55, 532 N.E.2d at 922.

¶ 40 Here, DMG's operator drove a forklift owned by DMG into a steel beam, crushing plaintiff. The jury determined the operator's negligent conduct in controlling the forklift was a proximate cause of the accident. Based on the evidence presented at trial, a reasonable jury could find that the operator's conduct of controlling the forklift met the foreseeability, substantial-factor, and but-for tests for the proximate cause of plaintiff's injuries. It is no defense to DMG that AVI and PMC were also a cause of plaintiff's injuries, as the jury still found DMG's own negligent conduct was a proximate cause of the accident. Accordingly, DMG's assertion that its forklift and operator were not a proximate cause of plaintiff's accident is mistaken.

¶ 41 DMG lastly alleges the trial court erred in denying its motion for a new trial, as the jury's verdict was unreasonable, arbitrary, and not based upon any evidence. DMG asserts it should be granted a new trial because each witness provided testimony that the accident occurred because the cart was not properly rigged, and no single witness testified that DMG's forklift malfunctioned or that the operator of the forklift drove it erratically.

¶ 42 DMG's argument is misguided. While it may be true that the forklift did not malfunction and was not driven erratically, the record clearly indicates DMG's employee was operating the forklift that crushed plaintiff into a steel beam. Furthermore, the 28,500-pound water pump being transported on defendant's forklift that crushed plaintiff into the steel beam was owned by DMG, and the accident occurred on DMG's premises.

¶ 43 After careful review of the evidence presented at trial, we cannot say the jury's findings were unreasonable, arbitrary, or against the manifest weight of the evidence. The trial court did not err in denying DMG's motion for a directed verdict or judgment notwithstanding the verdict, nor did it abuse its discretion in denying DMG's motion for a new trial on the grounds that plaintiff failed to show DMG owed plaintiff a duty of care and failed to prove DMG's negligence proximately caused plaintiff's injuries.

¶ 44 II. AVI

¶ 45 A. Motion for Directed Verdict and Posttrial Relief

¶ 46 AVI alleges the trial court erred in granting a directed verdict in favor of plaintiff at the close of plaintiff's evidence and erred in denying AVI's posttrial relief. AVI contends it was error for the trial court to instruct the jury that it had directed a verdict against AVI before the defense offered any evidence, as this limited AVI's ability to present evidence and argue its case. Further, AVI asserts the trial court never instructed the jury as to the reason it directed a verdict against AVI, and it alleges the trial court's rulings were clearly erroneous, contrary to logic and law, and should be reversed.

¶ 47 In the instant case the trial court directed negligence liability and product liability against AVI based on certain statements made by AVI employees during trial. The dispositive issue in this case is whether these statements constituted judicial admissions to which the trial court directed a verdict in favor of plaintiff and against AVI.

¶ 48 A judicial admission is a (1) deliberate, (2) clear, (3) unequivocal, (4) statement of a party, (5) about a concrete fact, (6) within that party's peculiar knowledge. *Brummet v. Farel*, 217 Ill. App. 3d 264, 266, 576 N.E.2d 1232, 1234 (1991). A judicial admission is conclusive upon the party making it and may not be controverted at trial or on appeal. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

¶ 49 A judicial admission is not evidence at all but rather has the effect of withdrawing a fact from contention. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. Judicial admissions include "admissions made in pleadings, formal admissions made in open court, stipulations, and admissions pursuant to requests to admit." *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

¶ 50 The doctrine of judicial admissions requires thoughtful consideration to ensure that "justice not be done on the strength of a chance statement made by a nervous party." *Thomas v. Northington*, 134 Ill. App. 3d 141, 147, 479 N.E.2d 976, 981 (1985). The general rule is qualified. Judicial admissions only apply when a party's testimony, taken as a whole, is unequivocal. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. The rule is inapplicable when the party's testimony is inadvertent, uncertain, or amounts to an estimate rather than a statement of concrete fact. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. Further, the rule is inapplicable when the facts relate to a matter about which the party could have been mistaken, such as swiftly moving events preceding a collision in which the party was injured. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

¶ 51 The trial court's ruling on an issue of judicial admission is a matter for the trial court's sound discretion, and we are to affirm the trial court unless it abused that discretion. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468, 914 N.E.2d 1258, 1268 (2009). An abuse of discretion is

found only where no reasonable person would take the view adopted by the trial court. *Smith*, 394 Ill. App. 3d at 468, 914 N.E.2d at 1268.

¶ 52 A party may, by his own testimony, "conclusively bar his claim or his defense," but whether a party's testimony defeats his own claim depends upon an evaluation of all of his testimony, and not just a portion of it. *McCormack v. Haan*, 20 Ill. 2d 75, 78, 169 N.E.2d 239, 240-41 (1960). The abuse of discretion standard focuses on the context of the purported admission:

> "What constitutes a judicial admission must be decided under the circumstances in each case, and before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it was found. [Citation.] It must also be considered in relation to the other testimony and evidence presented." *Smith*, 394 Ill. App. 3d at 468, 914 N.E.2d at 1268.

¶ 53 In the instant case, several witnesses testified concerning AVI's involvement in plaintiff's accident. One such witness was Scott Docimo, an AVI employee who was the only AVI representative on-site at the power plant at the time of plaintiff's accident. Docimo was at the power plant to provide technical supervision and inspection concerning the removal of equipment at the plant. During trial Docimo admitted he saw workers rigging the load onto the forklift improperly, knew it was unsafe, and said nothing despite his superior knowledge.

> "Q. [Attorney for plaintiff:] You knew that they were pushing it in a way–you were the expert, and you let them push it, and you let the play develop right in front of you. And part of the reason that the cart was going squiggly, was because of how it was rigged, am I right?
>
> A. Correct.
>
> Q. And I want you to go to Page 133, Line 17. I said, 'What ***' The question was asked, 'Would anything have prevented you from telling them that?' Telling them that, warning them, doing your job. What did you say on Line 17? What would have prevented you? Read the answer.
>
> A. 'Yes. Sorry. Yes, it would because of liability. For me to tell them how to rig something, automatically puts liability onto me, which I'm not there for.'
>
> Q. You never told anyone before this accident that they should not rig it that way, did you?
>
> A. No."

¶ 54 Clifford Burrell, the president of AVI, also testified during trial and admitted Docimo should have said something when he saw the men improperly rigging the load onto the forklift.

> "Q. [Attorney for plaintiff:] He did not say anything. So that there's no misunderstanding then, sir, you're here to tell me, as the head of this company, that Mr. Docimo, who admitted that he saw something unsafe and didn't say anything, he should have said something, am I correct?
>
> A. Yes.
>
> Q. Yes. And so that we can have no further disagreement between you and I, is that–there's no misunderstanding. You would then agree that the reason–if this cart didn't go straight, it was because it was unsafely affixed, and Docimo should have said something about it, am I right?
>
> A. Yes."

¶ 55 Burrell then admitted that AVI's cart was intended to roll straight but failed to do so at the time of plaintiff's accident. Burrell indicated AVI's cart possessed caster locks and was capable of locking its wheels for the purpose of keeping the wheels straight, but admitted he had not informed Docimo or anyone from DMG or PMC about the feature:

> "Q. [Attorney for plaintiff:] Did you ever tell the guy who you sent to be your representative on this job, did you ever tell him that that cart could be locked?
>
> A. No.
>
> Q. You never told him. Did you tell anybody from AVI that the cart could be locked? Or strike that. From DMG, did you tell anybody from DMG that when you want to take this cart and start going north and south with it, you can lock it so the wheels won't wobble? Did you tell anybody from [DMG] that?
>
> A. I was not there.
>
> Q. Did you tell them before you sent it?
>
> A. No.
>
> Q. Did you tell anybody from PMC that this cart that you had designed, manufactured, specified, did you tell them that the wheels could be locked?
>
> A. No.
>
> Q. Did anybody know?
>
> A. No."

¶ 56 Based on these admissions made by Docimo and Burrell, the trial court directed negligence and product liability against AVI. After careful review of the record before us, we cannot say the trial court abused its discretion in finding AVI's testimony contained judicial admissions that it was negligent in supervising the transportation of the water pump from the power plant and strictly liable for the defective cart that contributed to plaintiff's injuries. The trial court never suggested how much fault the jury should attribute to AVI, only that it could not be completely free of fault. AVI retained the right to argue for a low percentage of fault, which it in fact did. Directing a verdict against AVI for negligence and product liability was well within the trial court's discretion.

¶ 57 AVI asserts that Docimo, an AVI employee not in the control group of AVI, was not a party to the proceeding and, therefore, legally could not have made a judicial admission on behalf of AVI. While AVI accurately indicates Docimo was not a party to the action, AVI fails to recognize that Burrell, as president of AVI, also testified and admitted fault concerning AVI's negligence and product liability. As president of AVI, Burrell was certainly within the control group of AVI and had the ability to make judicial admissions on behalf of AVI, which he did.

¶ 58 AVI next asserts the trial court improperly directed the issue of proximate cause against AVI at the close of plaintiff's case. AVI indicates the issue of proximate cause is ordinarily a question of fact to be determined by a jury from a consideration of all the evidence. *Sabo v. T.W. Moore Feed & Grain Co.*, 97 Ill. App. 2d 7, 9, 239 N.E.2d 459, 463 (1968). AVI argues the trial court directed the issue of proximate cause against AVI with no legal or factual support. We disagree.

¶ 59 AVI ignores that where facts are undisputed and reasonable men could not differ as to the inferences to be drawn from those facts, proximate cause may be determined as a matter of law. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 476,

758 N.E.2d 848, 854 (2001) (Harrison, C.J., specially concurring, joined by Kilbride, J.). Here, the undisputed facts indicate AVI cannot be free of responsibility for plaintiff's injuries, as AVI owned and maintained the cart that contributed to plaintiff's injuries.

¶ 60 Moreover, Scott Docimo, the AVI employee who was at the power plant to provide technical supervision and inspection for the removal of the pump, witnessed workers improperly rig the pump to AVI's cart and DMG's forklift and said nothing. Docimo could have prevented the accident from occurring by warning the workers that they improperly rigged the pump to the cart and forklift but did not. Further, Burrell testified he did not inform anyone of the caster-lock feature on the cart which would have positioned the wheels to move straight rather than side to side.

¶ 61 It is unreasonable for AVI to allege it was not in any way a proximate cause of plaintiff's injuries. Accordingly, the trial court properly directed the issue of proximate cause against AVI.

¶ 62 AVI then alleges the record does not support a finding of negligence or product liability against AVI. We disagree. We find that Docimo and Burrell's testimony supports a finding of AVI's negligence and strict product liability.

¶ 63 In pleading negligence, the plaintiff must allege facts showing the defendant (1) owed him or her a duty of care and (2) breached that duty, and (3) this breach was the proximate cause of his or her injuries. *Rahic v. Satellite Air-Land Motor Service, Inc.*, 2014 IL App (1st) 132899, ¶ 19, 24 N.E.3d 315.

¶ 64 Here, Docimo admitted he did not say anything to the PMC employees or DMG operator when he saw them improperly rig the pump to the cart and forklift, and Docimo's boss and president of AVI, Burrell, condemned this silence as inexcusable. The trial court directed negligence liability on this basis. As the sole AVI employee on-site to provide supervision for the removal of the pump, Docimo owed a duty of care to plaintiff that was breached when Docimo did not inform the workers they had improperly rigged the pump to the cart and forklift, and this improper rigging was the cause of plaintiff's accident. Thus, the elements of AVI's negligence have been satisfied and AVI's argument that the record does not support a finding of negligence is mistaken.

¶ 65 AVI also argues the record does not support a finding on the product liability claim. To prevail on a product liability claim alleging defective design, the plaintiff must establish that the allegedly defective condition of the product is a proximate cause of his injury. *Barr v. Rivinius, Inc.*, 58 Ill. App. 3d 121, 127, 373 N.E.2d 1063, 1067 (1978). The standards for proving proximate causation are the same whether the case concerns negligence or strict liability in tort. *Barr*, 58 Ill. App. 3d at 127, 373 N.E.2d at 1067. "Proximate cause exists if the injury is the natural and probable result of the negligent act or omission and is of such a character that an ordinarily prudent person would have foreseen it as a result of such negligence." *Niffenegger v. Lakeland Construction Co.*, 95 Ill. App. 3d 420, 425, 420 N.E.2d 262, 267 (1981).

¶ 66 The intervention of independent, concurrent, or intervening forces will not disrupt the causal connection if such intervention was foreseeable. *Niffenegger*, 95 Ill. App. 3d at 426, 420 N.E.2d at 267. "[A] plaintiff may demonstrate that a product is unreasonably dangerous because of a design defect by presenting evidence of an alternative design that would have prevented the injury and was feasible in terms of cost, practicality and technological

possibility." *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 436, 764 N.E.2d 35, 45 (2002).

¶ 67 In the instant case, Burrell admitted that as president of AVI, he designed the cart in question so that it moves straight when pushed. Burrell then admitted the cart did not move straight at the time of plaintiff's accident, and Docimo also acknowledged the cart was wobbly. Burrell then admitted he did not tell anyone that the AVI cart had caster locks built into the cart before it was used at DMG's power plant. The caster locks would have enabled the wheels to move straight, and it is reasonable to conclude plaintiff's accident would not have occurred if the workers had known about the caster-lock feature. We find AVI's failure to inform the workers on-site of the caster-lock feature and AVI's acknowledgement that the cart was not moving straight as intended during the accident amounts to a defective condition that supports a finding of product liability.

¶ 68 AVI argues the trial court's failure to define the conduct of AVI on which it directed the verdict of negligence as a matter of law was tantamount to failing to instruct the jury on an issue, which was an abuse of discretion that prejudiced AVI. However, AVI fails to indicate how it was prejudiced. AVI also indicates that for the negligent design theory, plaintiff was required to produce evidence of the standard of care in the industry at the time of design and a deviation from that standard. AVI asserts this proof required expert opinion testimony, but plaintiff disclosed no expert and offered no expert testimony concerning its cart's design.

¶ 69 For the reasons stated above, we find that Docimo's and Burrell's testimony satisfied the proof necessary for the trial court to direct a verdict of negligence against AVI, and this matter need not be addressed further.

¶ 70 In its reply brief, AVI argues there is no legal precedent for entering a directed verdict against a party who has had no opportunity to present any evidence in the case unless that party was defaulted. AVI contends plaintiff's argument that the trial court was well within its discretionary powers to order a directed verdict against AVI at the close of plaintiff's case in chief is legally wrong. We disagree.

¶ 71 The fact that the trial court directed a verdict against AVI before AVI offered evidence contrary to the overwhelming evidence against it does not necessitate a jury determination on the question of AVI's negligence or product liability. "As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 504-05, 229 N.E.2d 504, 510 (1967).

¶ 72 Constitutional guarantees are not impaired by a directed verdict despite the presence of some slight evidence to the contrary, for the right to a jury trial includes the right to a jury verdict only if there are factual disputes of some substance. *Pedrick*, 37 Ill. 2d at 505, 229 N.E.2d at 510. Further, once a party makes a judicial admission adverse to his or her claim, that party cannot contradict the admission by adopting inconsistent evidence produced by other witnesses. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 71 Ill. App. 3d 562, 568, 390 N.E.2d 60, 64 (1979).

¶ 73 As noted above, we find no factual dispute that AVI was at least partially responsible for plaintiff's injuries. The fact the trial court directed a verdict against AVI before AVI presented any evidence is irrelevant, as the only matter foreclosed by the trial court's directed verdict was that AVI was 0% at fault for plaintiff's accident. AVI retained the right to argue a low percentage of fault to the jury, which AVI did.

¶ 74 AVI also requests that this court enter a judgment notwithstanding the verdict in its favor. As discussed above, a judgment notwithstanding the verdict is properly entered where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could stand. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542.

¶ 75 Considering all the evidence in the light most favorable to AVI, the evidence so overwhelmingly favors plaintiff in this case that no contrary verdict can stand on the issue of AVI's negligence and product liability. Accordingly, the trial court did not abuse its discretion in directing verdicts of negligence and product liability against AVI, the trial court's verdicts were not against the manifest weight of the evidence, and the trial court did not err in denying AVI's motion for a judgment notwithstanding the verdict.

¶ 76 B. Motion for New Trial

¶ 77 AVI alleges it was deprived of a fair trial as a result of multiple and cumulative errors in the trial court's rulings, and asserts it should be granted a new trial.

¶ 78 A court's ruling on a motion for a new trial will not be reversed except in those instances where it is affirmatively shown that the court clearly abused its discretion. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 548, 416 N.E.2d 268, 270 (1981). An abuse of discretion is found only where no reasonable person would take the view adopted by the trial court. *Smith*, 394 Ill. App. 3d at 468, 914 N.E.2d at 1268. For the following reasons, we find AVI's arguments lack merit.

¶ 79 AVI first alleges the trial court erred in allowing testimony from June Hight, Dr. Kirby, and Jason Reynolds. AVI indicates June Hight was not disclosed as a trial witness until two weeks before trial without reason, but she was allowed to testify over objection. AVI indicates Dr. Kirby was allowed to testify concerning opinions not in his records on permanency and prognosis, and all of AVI's objections to Dr. Kirby's testimony were overruled without hearing. AVI also alleges Jason Reynolds of DMG was not disclosed to give any opinion testimony, but the trial court allowed plaintiff to ask leading questions adverse only to AVI based on what Reynolds had seen and heard in the courtroom. AVI asserts the trial court's rulings violated Illinois Supreme Court Rules 213(f) (eff. Jan. 1, 2007) and 218 (eff. Oct. 4, 2002).

¶ 80 AVI also alleges the trial court allowed improper impeachment of its witnesses. AVI asserts Mr. O'Leary was impeached by the absence of content in his statements and deposition rather than contrary statements. AVI also alleges plaintiff's counsel impeached Docimo by the absence of content in his statements and deposition and not by contrary statements, and contends the law regarding impeachment was ignored. We disagree with AVI's arguments.

¶ 81 AVI offers no explanation as to why these witnesses' testimony violated Supreme Court Rules 213(f) and 218, and it cites no supporting authority in its brief based on these claims. AVI also offers no explanation for how it was prejudiced or what was improper about the impeachment. "[I]t is well settled that *** bare contentions that fail to cite any authority do not merit consideration on appeal." (Internal quotation marks omitted.) *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 64, 14 N.E.3d 576. AVI has failed to raise these issues adequately. In light of the foregoing circumstances, we find it unnecessary to address these matters further.

¶ 82 AVI then alleges plaintiff's counsel used improper lines of inquiry. AVI points to specific instances of questioning regarding Docimo and Burrell that were allegedly improper, but offers no supporting authority or explanation. For this reason, we need not address this argument.

¶ 83 AVI next alleges the trial court improperly tendered Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011) (hereinafter, IPI Civil (2011)) against AVI for its failure to bring its cart to trial which resulted in prejudice to AVI. As a result, AVI contends it should be granted a new trial.

¶ 84 The decision whether to tender IPI Civil (2011) No. 5.01 to the jury is within the sound discretion of the trial court, and that decision will not be reversed absent a clear abuse of discretion. *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 696, 800 N.E.2d 847, 853 (2003). IPI Civil (2011) No. 5.01, also known as the "missing-evidence instruction," allows a jury to draw an adverse inference from a party's failure to offer evidence. *Kersey*, 344 Ill. App. 3d at 696, 800 N.E.2d at 852.

¶ 85 IPI Civil (2011) No. 5.01 may be properly given where some foundation is presented on each of the following: (1) the evidence was under the control of the party and could have been produced through the exercise of reasonable diligence, (2) the evidence was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed the evidence to be in his favor, and (4) no reasonable excuse for the failure has been shown. *Jenkins v. Dominick's Finer Foods, Inc.*, 288 Ill. App. 3d 827, 831, 681 N.E.2d 129, 132 (1997). However, IPI Civil (2011) No. 5.01 is not warranted where the missing evidence is merely cumulative of the facts already established. *Jenkins*, 288 Ill. App. 3d at 831, 681 N.E.2d at 132.

¶ 86 Here, the trial court tendered IPI Civil (2011) No. 5.01 after Burrell's testimony concerning the caster-lock feature on the cart and Burrell's assertion that the cart could push 52,000 pounds across a flat concrete surface. The trial court indicated that because AVI's cart was not equally available to the parties and was under AVI's sole control, the cart should have been produced at trial as there were still issues concerning the cart to be decided by the jury. We do not find the trial court abused its discretion in tendering IPI Civil (2011) No. 5.01. We agree that the cart was not equally available to the parties and was in the sole control of AVI and, therefore, should have been produced at trial.

¶ 87 AVI argues the adverse presumption of not producing the cart at trial was irrelevant because the trial court had already decided liability. We disagree. While the trial court had already directed a verdict when it tendered IPI Civil (2011) No. 5.01, each party's degree of fault was still an issue to be decided by the jury, and production of the cart as evidence at trial would have helped the jury in that determination.

¶ 88 AVI also contends it was improper for the trial court to tender IPI Civil (2011) No. 5.01 immediately before releasing the jury to consider defendant's fault. We disagree. The jury found AVI 37% at fault for plaintiff's accident and DMG 47% at fault. After careful review of the record, we find this apportionment of fault reasonable. Reversal is not warranted if it is unlikely the error influenced the jury. *People v. Hall*, 194 Ill. 2d 305, 339, 743 N.E.2d 521, 541 (2000). Because AVI's proportion of fault was reasonable, we find that even if it was error for the trial court to tender IPI Civil (2011) No. 5.01, it was not an error that influenced the jury warranting a new trial.

¶ 89 AVI next asserts the trial court improperly barred AVI *in limine* and during trial from presenting testimony regarding the specific cart in question, precluding AVI from eliciting testimony that DMG utilized the same AVI cart at its facility subsequent to the date of loss on other jobs, and that DMG designed and built its own cart using the same exact design as the AVI cart. This argument is irrelevant to the trial court's finding of negligence and product liability against AVI.

¶ 90 AVI then alleges the trial court erred in allowing plaintiff's counsel to submit a closing and rebuttal argument that was attacking and personal to opposing counsel, inflammatory, prejudicial and punitive in nature, engaging in argument with opposing counsel rather than an argument to the jury concerning the evidence, and unfounded by the evidentiary record. We disagree.

¶ 91 AVI indicates plaintiff's counsel argued the credibility of defense counsel, pointed a finger at AVI's counsel, and addressed AVI's counsel personally during the proceedings. We find plaintiff counsel's conduct was trial strategy that did not rise to the level of prejudice meriting reversal of the trial court's denial of AVI's motion for a new trial.

¶ 92 Finally, AVI alleges the trial court erred in numerous submissions and rejections of jury instructions. AVI asserts the trial court erred in submitting plaintiff's instruction No. 11/IPI Civil (2011) No. 20.01 to the jury and rejecting AVI's proposed instruction No. 1 and AVI's instruction No. 7/IPI Civil (2011) No. B21.07. AVI asserts the trial court erred in submitting plaintiff's instruction No. 15/IPI Civil (2011) Nos. 30.01, 30.04, 30.05, 30.06, and 30.07.

¶ 93 AVI also alleges the trial court erred in submitting plaintiff's instruction No. 18/verdict form IPI Civil (2011) No. 600.14 modified and rejecting AVI's alternative instruction No. 2/IPI Civil (2011) Nos. 600.14, 30.04, 30.05, 30.06, and 30.07 modified. Furthermore, AVI alleges the trial court erred in rejecting AVI's instruction No. 4/IPI Civil (2011) No. 5.01 as to DMG employee William Harms, and alleges the trial court erred in rejecting AVI's instruction No. 9/IPI Civil (2011) No. 41.05, instruction No. 11/IPI Civil (2011) No. 600.02, and instruction No. 12/IPI Civil (2011) No. 600.04.

¶ 94 The trial court has discretion to determine which instructions to give the jury, and that determination will not be disturbed without an abuse of that discretion. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273, 775 N.E.2d 964, 972 (2002). The standard for deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles. *Schultz*, 201 Ill. 2d at 273-74, 775 N.E.2d at 972-73. Moreover, "[a] reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless [the instructions] clearly misled the jury and resulted in prejudice to the appellant." *Schultz*, 201 Ill. 2d at 274, 775 N.E.2d at 973.

¶ 95 As discussed above, we find the jury's apportionment of 37% fault to AVI reasonable after careful review of the record. AVI has failed to establish it was prejudiced by the abovementioned jury instructions or that the jury was misled.

¶ 96 C. Plaintiff's Second Amended Complaint

¶ 97 AVI alleges plaintiff's second amended complaint was factually and legally deficient on its face warranting its dismissal. AVI asserts the record on appeal indicates plaintiff's second amended complaint was never filed and, therefore, the trial court's corresponding entry of

directed verdict, judgment, and other rulings against AVI premised on that complaint were improper. We disagree.

¶ 98 After careful review of the record, we find the record indicates plaintiff's second amended complaint was file-stamped by the circuit clerk on November 4, 2013. Moreover, AVI filed a motion to dismiss plaintiff's second amended complaint on November 12, 2013, and filed its answer and affirmative defenses to plaintiff's second amended complaint on November 18, 2013. For these reasons, AVI's argument that plaintiff failed to file his second amended complaint lacks merit.

¶ 99 AVI next asserts that if plaintiff's second amended complaint is deemed to have been filed, it nevertheless fails to satisfy Illinois pleading requirements.

¶ 100 A complaint only needs to contain a "plain and concise statement of plaintiff's cause of action; it is unnecessary for the complaint to set forth evidence that plaintiff intends to introduce at trial." *Lozman v. Putnam*, 328 Ill. App. 3d 761, 769, 767 N.E.2d 805, 812 (2002). Pleadings in the complaint are liberally construed " 'with a view to doing substantial justice between the parties.' " *Lozman*, 328 Ill. App. 3d at 769, 767 N.E.2d at 812 (quoting 735 ILCS 5/2-603(c) (West 2000)). A cause of action should not be dismissed on the pleadings unless it is apparent that no set of facts can be proved under the pleadings which would entitle plaintiff to recover. *Lozman*, 328 Ill. App. 3d at 769, 767 N.E.2d at 812-13.

¶ 101 AVI alleges plaintiff pled no facts giving rise to any duty owed by AVI to inspect and control the forklift, the forklift's operation, and the premises, and alleges plaintiff's complaint was void of factual support for plaintiff's product liability allegations. AVI's argument is misguided.

¶ 102 In his complaint plaintiff alleged he was crushed into a steel beam by a forklift pushing a cart owned and maintained by AVI. In his negligence count, plaintiff alleged AVI designed, manufactured, and supplied the cart giving rise to plaintiff's injuries, and supervised the incident in which plaintiff was injured. Plaintiff also alleged AVI furnished a defective, unsafely designed, and unsafely maintained cart and failed to warn plaintiff of impending peril. In his product liability count, plaintiff alleged the cart was in a defective and unreasonably dangerous condition at the time it left the possession and control of AVI.

¶ 103 These alleged facts are enough to state a cause of action. Accepting the factual allegations in plaintiff's complaint as true and considering them in a light most favorable to plaintiff, sufficient facts have been pled to demonstrate AVI's negligence and product liability. Plaintiff has pled a connection between plaintiff's injuries and AVI's potential negligence and product liability. Accordingly, plaintiff's second amended complaint alleges sufficient facts to satisfy the Illinois pleading standard.

¶ 104 D. Timeliness of Plaintiff's Product Liability Claim

¶ 105 AVI alleges plaintiff's untimely submission of the product liability claim violated the statutes of limitation and repose. AVI asserts there is no dispute that plaintiff's product liability claim was governed by Illinois's two-year statute of limitations period, and, therefore, plaintiff's claim had to be filed on or before October 8, 2009, two years from the date of plaintiff's accident. 735 ILCS 5/13-202 (West 2012). Since plaintiff's product liability claim was filed on November 4, 2013, more than six years after plaintiff's accident and four years

after the statute of limitations period expired, AVI contends plaintiff's submission was untimely. AVI also asserts the relation-back doctrine does not apply.

¶ 106 Section 2-616(b) of the Code of Civil Procedure provides that a cause of action alleged in an amended complaint, filed after the expiration of the statute of limitations period, will relate back to the filing of the original complaint if two requirements are met: (1) the original pleading was timely filed, and (2) the original and amended pleadings indicate the cause of action asserted in the amended complaint grew out of the same transaction or occurrence set forth in the original proceeding. 735 ILCS 5/2-616(b) (West 2012); *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 106, 672 N.E.2d 1207, 1222-23 (1996). This rule is "remedial in nature and should be liberally construed in favor of hearing the plaintiff's claim." *Bryson*, 174 Ill. 2d at 106, 672 N.E.2d at 1223.

¶ 107 In the instant case, plaintiff's product liability count relates back to the filing of plaintiff's negligence count against AVI. Plaintiff filed a first amended complaint on October 1, 2008, alleging a single count of negligence against AVI arising from plaintiff's accident at the power plant. Plaintiff's first amended complaint was timely, as it was filed within two years of his accident. Accordingly, the first requirement of the relation-back doctrine has been met. The second requirement of the relation-back doctrine is also satisfied here, as plaintiff's product liability count arises from the same accident as the negligence count. Hence, plaintiff's product liability count against AVI properly relates back to the timely filing of plaintiff's negligence count against AVI, and the statute of limitations has not been violated.

¶ 108 AVI argues plaintiff's product liability count asserted new causes of action premised on facts distinct in scope and time from plaintiff's negligence count against AVI. We disagree. Plaintiff's negligence and product liability counts both arose from the same accident at the same power plant that occurred at the same time in question. Plaintiff's product liability count was not premised on facts distinct in scope and time from plaintiff's negligence count.

¶ 109 AVI also asserts plaintiff's untimely filing of the product liability count against AVI violated the Illinois statute of repose. No strict product liability action shall be commenced except within the applicable limitations period and within 12 years from the date of the first sale, lease, or delivery by a seller, or 10 years from the date of the first sale, lease, or delivery to its initial user, consumer, or other nonseller, whichever period expires earlier. *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 30, 959 N.E.2d 94. AVI indicates its cart was manufactured and released in 1999, and, therefore, the 12-year repose period expired at the latest in 2011. AVI contends plaintiff's strict product liability claim filed in 2013 was outside the 12-year repose period and violated the statute. We disagree.

¶ 110 The record indicates AVI was a lessor of its cart, as AVI repeatedly placed its cart in the stream of commerce for over a decade and obtained profits each time the cart was leased. "Anyone who is in the business of placing a defective product into the stream of commerce by leasing it, rather than selling it, may be strictly liable for any injuries which proximately result therefrom." *Timm v. Indian Springs Recreation Ass'n*, 187 Ill. App. 3d 508, 511, 543 N.E.2d 538, 541 (1989).

¶ 111 The accident in the instant case occurred in 2007, and plaintiff filed a strict product liability claim against AVI in 2013. Hence, plaintiff brought his product liability claim six years after AVI leased its cart, well within the statute of repose. AVI's argument that its cart was manufactured more than 12 years from the time plaintiff brought his product liability claim is

of no avail, as AVI fails to recognize it was a lessor of the cart rather than a seller at the time of plaintiff's accident.

¶ 112 E. Eleventh-Hour Filing

¶ 113 In its final issue raised on appeal, AVI alleges the trial court's consent to plaintiff's eleventh-hour filing of new causes of action and the trial court's denial of AVI's motion for a trial continuance were contrary to law, prejudicial to AVI, and an abuse of discretion.

¶ 114 Section 2-616(c) of the Code of Civil Procedure provides:

> "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(c) (West 2012).

¶ 115 The four relevant factors to be considered in determining whether to allow pleading amendments are:

> "(1) whether the proposed amendments would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) the timeliness of the proposed amendment; and (4) whether previous opportunities to amend the pleadings could be identified." *Arroyo v. Chicago Transit Authority*, 268 Ill. App. 3d 317, 322, 643 N.E.2d 1322, 1326 (1994).

¶ 116 Whether to allow an amendment to pleadings is within the sound discretion of the trial court, whose determination will not be disturbed on appeal in the absence of an abuse of discretion. *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 897, 929 N.E.2d 114, 119 (2010). A trial court abuses its discretion if no reasonable person would take the view adopted by the trial court. *Lewandowski*, 401 Ill. App. 3d at 897, 929 N.E.2d at 119. The trial court should exercise its discretion liberally in favor of allowing amendment if allowing it will further the ends of justice. *Arroyo*, 268 Ill. App. 3d at 322, 643 N.E.2d at 1326.

¶ 117 AVI alleges plaintiff's amendment resulted in prejudice and hardship to AVI, as it was left with no time to disclose experts on plaintiff's product liability claim. AVI claims the amendment changed the nature of the action it faced at trial, including the nature and quality of proof required to defend, and the trial court abused its discretion in allowing the amendment. AVI also claims it was prejudiced by the trial court's refusal of a continuance. We disagree.

¶ 118 In the instant case, plaintiff's motion to amend the pleadings came two weeks prior to trial. While AVI claims it was prejudiced by plaintiff's eleventh-hour filing adding a product liability claim, it fails to indicate how it was prejudiced. AVI does not explain why it was prejudiced by the trial court's refusal of a trial continuance and does not indicate what experts it wanted to testify concerning plaintiff's product liability claim. Moreover, AVI was alerted to the issues concerning its defective cart in 2009 through its own discovery questions. AVI was already on notice of its defective cart, and to claim it was prejudicial for plaintiff to bring a product liability claim against AVI is unreasonable. We therefore conclude the trial court was within its discretion to allow plaintiff's eleventh-hour request to amend his complaint two weeks prior to trial.

¶ 119 AVI indicates that amendments brought at the start of trial are inappropriate when they could have been brought earlier, as they alter the evidence required to defend and foreclose the time a party has to engage in discovery and procure requisite witnesses to defend the amended

allegations. *Arroyo*, 268 Ill. App. 3d at 322-23, 643 N.E.2d at 1326. *Arroyo* is distinguishable from the case at bar.

¶ 120 In *Arroyo*, the court denied the plaintiff's motion to amend complaint that was brought 1 day before the scheduled trial date and 11 years and 7 months after the initial filing of the complaint. The time frame in the instant case is not comparable. Here, plaintiff's motion to amend was filed 2 weeks prior to the scheduled trial date rather than 1 day, and was filed approximately 5 years after the original complaint was filed rather than 11-plus years. Accordingly, we find the trial court was well within its discretion to allow plaintiff to amend his complaint.

¶ 121 CONCLUSION

¶ 122 For the reasons stated herein, we affirm the judgment of the circuit court of St. Clair County.

¶ 123 Affirmed.

ILLINOIS OFFICIAL REPORTS

Supreme Court

***Jablonski v. Ford Motor Co.*, 2011 IL 110096**

Caption in Supreme Court:	DORA MAE JABLONSKI *et al.*, Appellees, v. FORD MOTOR COMPANY *et al.* (Ford Motor Company, Appellant).
Docket No.	110096
Filed	September 22, 2011
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	The duty analysis in a negligent-product-design case encompasses a risk-utility balancing test, and while compliance with industry standards is a relevant factor in that analysis, it is not dispositive.
Decision Under Review	Appeal from the Appellate Court for the Fifth District; heard in that court on appeal from the Circuit Court of Madison County, the Hon. A.A. Matoesian, Judge, presiding.
Judgment	Judgments reversed.

Counsel on Appeal

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Justices

JUSTICE THEIS delivered the judgment of the court, with opinion.

Justices Freeman, Garman, Karmeier, and Burke concurred in the judgment and opinion.

Chief Justice Kilbride and Justice Thomas took no part in the decision.

OPINION

¶ 1 In this appeal, we are asked to clarify the duty analysis in a negligent-product-design case. Plaintiffs, Dora Mae and John L. Jablonski, Jr., as the special administrator and personal representative of the estate of John L. Jablonski, Sr., brought this action in the circuit court of Madison County against Ford Motor Company, alleging, *inter alia*, negligent design of the 1993 Lincoln Town Car's fuel tank and willful and wanton conduct, seeking punitive damages. The jury returned a general verdict in the Jablonskis' favor and awarded a total of $28 million in compensatory damages and $15 million in punitive damages. The appellate court affirmed the circuit court judgment. 398 Ill. App. 3d 222. This court allowed Ford's petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010). For the reasons that follow, we reverse the judgments below.

¶ 2 BACKGROUND

¶ 3 On July 7, 2003, John and Dora Jablonski were traveling home in their 1993 Lincoln Town Car on I-270 in Madison County, Illinois, when they came to a complete stop in a construction zone. A Chevrolet Lumina driven by Natalie Ingram slammed into the Jablonskis' Town Car at a high rate of speed with no evidence of braking. According to experts, the Lumina struck the Town Car at between 55 and 65 miles per hour. As a result of the crash, a large pipe wrench in the trunk of the Town Car penetrated the trunk and punctured the back of the vehicle's fuel tank. The vehicle burst into flames, causing John's death and Dora's severe burns and permanent disfigurement.

¶ 4 Plaintiffs filed their original nine-count complaint against Ford and Ingram. After settling with Ingram, the case proceeded against Ford. Throughout the litigation, plaintiffs' theories of recovery continually evolved. By the time of trial, in their third amended complaint, plaintiffs alleged that at the time the 1993 Lincoln Town Car was designed and manufactured and "thereafter," Ford was under a legal duty to use ordinary care to ensure the 1993 Lincoln Town Car was not unreasonably dangerous and defective. Plaintiffs further alleged that at the time that Ford designed and manufactured the 1993 Lincoln Town Car, it was negligent and strictly liable in one or more of the following ways: (1) equipping the 1993 Lincoln Town Car with a vertical-behind-the-axle fuel tank; (2) failing to shield the vertical-behind-the-axle tank; and (3) failing to warn consumers of the risk of trunk contents puncturing the fuel tank.

¶ 5 Plaintiffs additionally alleged that these negligent acts constituted willful and wanton conduct. Plaintiffs specifically pleaded that at the time the 1993 Town Car was designed and manufactured Ford had knowledge of multiple deaths and/or serious injuries that were the result of its placement of its fuel tank behind the axle on certain of its vehicles, namely the Crown Victoria, the Mercury Grand Marquis and the Lincoln Town Car. Further, plaintiffs pleaded that Ford had knowledge that these particular models had an increased danger of fire-related injuries and that shielding and other devices were necessary to protect against fuel leakage and ignition.

¶ 6 The 11-day trial in this complex product design case included testimony from numerous lay and expert witnesses, encompassing over 3,000 pages of transcripts and hundreds of exhibits. After the close of the evidence, plaintiffs ultimately abandoned their strict liability claims, and the case was presented to the jury on several theories of negligent design and willful and wanton conduct: (1) failing to locate the fuel tank over the axle or forward of the rear axle; (2) failing to shield the fuel tank to prevent punctures by contents in the trunk; and (3) failing to warn of the risk of trunk contents puncturing the fuel tank. The jury was additionally instructed on a fourth theory never before pleaded, which was failing to inform the Jablonskis of certain remedial measures taken by Ford after the manufacture of the vehicle, but prior to the Jablonskis' accident. The following evidence was introduced to support those four theories.

¶ 7 Historically, in the sixties and seventies, most fuel tanks in passenger vehicles were located behind the rear axle, or "aft of axle," situated horizontally under the trunk of the vehicle, inches from the rear bumper. Research in 1968 indicated that this particular under-

the-trunk location was susceptible to fuel-fed fires in rear-end collisions. At that time, a safer alternative location was proposed to place the fuel tank over the rear axle.

¶ 8 In 1979, Ford introduced the "Panther platform" design, which ultimately served as the basis for several large civilian and law enforcement four-door sedan models, including the Mercury Grand Marquis, the Ford Crown Victoria, the Ford Crown Victoria Police Interceptor, and the Lincoln Town Car. In these models, including the 1993 Lincoln Town Car, Ford chose a different fuel tank configuration, referred to at trial as a "vertical-behind-the-axle" tank. The tank was located aft of the axle, but between the two rear wheels, about 40 inches from the rear bumper and in front of the trunk.

¶ 9 Much of the trial centered around whether this location was a reasonably safe location for the fuel tank. By 1981, Ford began designing various new passenger car models with front-wheel drive and the fuel tank located forward of the axle. By 1991, the majority of new Ford models were being manufactured with fuel tanks forward of the axle. The Panther platform and the Mustang were the only two types of vehicles Ford still manufactured with an aft-of-axle fuel tank. Other manufacturers, including Audi, BMW, Chrysler, General Motors, and Volvo, continued to manufacture vehicles with an aft-of-axle fuel tank.

¶ 10 I. Plaintiffs' Evidence

¶ 11 A. Negligent Fuel Tank Location

¶ 12 Plaintiffs' expert Mark Arndt was critical of the fuel system in all aft-of-axle tanks, including both the "under the trunk" and "vertical-behind-the-axle" locations because they failed to maintain fuel system integrity during a crash. Specifically, he stated that the aft-of-axle tank was defective because it was located in the "crush zone" in rear-impact collisions and was vulnerable to being punctured by trunk contents and vulnerable to being pushed into sharp objects in front of the tank. It was his opinion that trunk contents puncturing the tank was a well-recognized problem. He testified that the safest location for the fuel tank "for a fair amount of time" was forward of the axle. Alternatively, locating the tank over the axle would significantly reduce the crush from a rear-end collision.

¶ 13 In forming his opinions, Arndt relied on several factors including basic engineering design concepts with regard to designing products generally. He testified that design safety involves considerations to design-out a problem by eliminating the hazard. If the hazard cannot be completely eliminated, then the product should be shielded to minimize the hazard, and if shielding or guarding is not effective, then warnings should be provided about the nature of the danger or potential harm that could occur. Ford taught these basic engineering principles in its own class on fuel systems engineering and these principles were outlined in its class manual beginning in 1991.

¶ 14 1. *The Severy Research*

¶ 15 Arndt maintained that Ford had long been aware of the dangers associated with aft-of-axle fuel tanks, including the danger of objects in the trunk puncturing the fuel tank in a rear-end collision. In support of this opinion, Arndt relied upon research done by Derwyn Severy,

a researcher at UCLA, who conducted a series of automobile crash tests, partly funded by Ford. The Severy research was published as an article in 1968 in a publication of the Society of Automotive Engineers, a peer-reviewed journal. The article was introduced into evidence at trial. With respect to fuel tank integrity and suggested design revisions, the article provided that:

> "Several factors operate to determine the degree of attention given to an automobile safety oriented design problem. Prominent among these are the frequency with which the problem manifests itself, the degree of seriousness of the consequence when such problems arise, and the complexity or cost of solution of the problem."

¶ 16 After evaluating crash tests of vehicles with fuel tanks located under the trunk inches from the rear bumper, the article provided the following conclusions:

> "1. *** Initial findings indicate that much progress can be made in reducing the possibility of crash fires by incorporation of relatively inexpensive design considerations relating to fuel tanks and related fuel systems.
>
> 2. Design revisions that provide for better containment of fuel *** which position the tank in locations least likely to sustain significant structural collapse, and which reduce the likelihood of fuel tank rupture, even when moderately crushed, typify improvements that would greatly curtail crash-released fuel.
>
> 3. Fuel tanks should not be located directly adjacent to the rear bumper or behind the rear wheels directly adjacent to the fender sheet-metal as this location exposes them to rupture at very low speeds of impact ***.
>
> 4. Preliminary studies suggest that the area cradled by the rear wheels, above the rear axle and below the rear window represents an improved location for the fuel tank ***."

The article further explained as follows:

> "This location is least often compromised from collisions of all types. The rear wheels, axle, and suspension provide an excellent structure to resist collapse; it is sufficiently remote from the rear end to be relatively free from rear-end collapse forces and can be protected from the passenger compartment by a fire wall, which has already been shown to be required behind the rear seat back for other reasons."

In conclusion, the article indicated that "[c]ollision studies to date tend to support relocation of fuel tanks to the [over-the-axle] area, but further research is needed before this location can be recommended."

¶ 17 None of the vehicles tested in the Severy research had a tank located vertical-behind-the-axle and none involved testing for trunk contents puncturing the fuel tank. With respect to the under-the-trunk tanks Severy had researched, Arndt explained that "if the tank is under the trunk, given that the force is usually moving forward, very, very unlikely that you're going to get an object in the trunk puncturing [the tank]."

¶ 18 In 1969, Ford's engineers investigated the proposed new over-the-axle tank location in relation to the under-the-trunk location. Roger Daniel, a Ford safety engineer, drafted a handwritten memo to his superiors at Ford regarding "Future Gas Tank Location." In the

memo, he stated his understanding that the future direction with respect to fuel tank location was to "hang the tank under the trunk."

¶ 19 Although he indicated that there were advantages and disadvantages to this location, he stated that the under-the-trunk location was vulnerable to rear-end impacts. He recommended that "for all vehicles except wagons and convertibles, the best tank location by far appears to be [over] the axle." The advantage of this design, according to Daniel, was that it would be "[a]lmost impossible to crush the tank from the rear."

¶ 20 Thereafter, in 1970, the engineering staff at Ford prepared a typewritten memo which provided the following analysis:

> "We have examined possible fuel tank locations and determined that the safest place for a fuel tank is [over] the rear axle and below the package tray. In rear[-]end accidents, the tank is above and forward of vehicle components likely to crush during the collision or deform it, while in lateral accidents, the tires, axle, and wheel-house structure provide extensive protection against rupture or even excessive deformation."

The memo indicated that in the proposed over-the-axle tank location, the tank would be "high enough in the trunk to essentially preclude rupture from in-trunk articles during an accident. However, should such an unlikely rupture occur, the gasoline would be confined to the trunk."

¶ 21 The concern about rupture from in-trunk articles did not refer to the vertical-behind-the-axle tank location later chosen by Ford.

¶ 22 Thereafter, in a "Cost Engineering Report" to determine the potential cost of moving the fuel tank to the over-the-axle location, Ford's engineers concluded that the cost of that design change would have been $9.95 per vehicle. Ford chose not to incorporate that design change into the 1979 Panther platform vehicle.

¶ 23 2. *Other Accidents*

¶ 24 As additional support for its theory that the location of the tank was dangerous and that Ford knew of the risk of danger, plaintiffs introduced a list of 44 rear-end collisions between 1981 and 2003 (exhibit 1). The list revealed seven accidents that occurred prior to the sale of the 1993 Lincoln Town Car involving Panther platform vehicles with vertical-behind-the-axle tanks where there was a fuel-fed fire due to tank rupture. None of those accidents involved trunk contents puncturing the tank.

¶ 25 In conjunction with that list, plaintiffs additionally introduced, and Arndt relied upon, over objection, a list of 50 accidents involving fuel-fed fires in Panther platform vehicles, which specifically described the cause of each fire (exhibit 96). Exhibit 96 has no dates listed on it. However, when cross-referenced with exhibit 1, it reveals that after the sale of the 1993 Town Car, between 1997 and 2003, there were 11 incidents prior to the Jablonski accident where Crown Victoria Police Interceptors had trunk contents puncture the tank in high-speed rear-end collisions involving police officers.

¶ 26 Arndt additionally prepared and relied upon, over objection, a separate list of 416

incidents involving a very diverse set of Ford model vehicles manufactured over a wide range of years, from the mid-sixties to the early nineties, prior to the manufacture of the 1993 Lincoln Town Car. The list was compiled by Arndt from a larger list of incidents Ford had disclosed in answers to an interrogatory in another case from 1992 which also included some forward-of-the-axle tanks.

¶ 27 All of the 416 vehicles on the edited list had aft-of-axle tanks. A few were vehicles with a vertical-behind-the-axle tank, but none were Lincoln Town Cars or other Panther platform models and most were vehicles with tanks located under the trunk inches from the bumper. All of the 416 incidents involved either a puncture, split, or tear of the fuel tank, resulting in 364 burn injuries and 378 deaths. However, there was no evidence that any of these accidents were caused by trunk contents puncturing the tank.

¶ 28 On cross-examination, Arndt acknowledged that he did not know the speed of any of the 416 incidents and could not say how a 1993 Lincoln Town Car would have reacted under the same conditions of those incidents. He also agreed that the vast majority of the cars on the list were designed in the sixties and seventies and were not tested under the 1993 federal government standards for fuel system integrity. He acknowledged that some of the vehicles he removed from the accident list had forward-of-the-axle fuel tanks, but he could not say how many.

¶ 29 Arndt also agreed that as of 1991, most cars on the road had an aft-of-axle fuel tank. Therefore, it would be reasonable to believe that if asked about fires involving products on the road as of that date, most manufacturers would identify vehicles with aft-of-axle fuel tank fires because that is how most vehicles were designed. Arndt also acknowledged that he could not tell how the 416 incidents compared to any other manufacturer during the same time period. He also could not tell how the 416 compared to the total number of accidents actually reported and collected during that time period.

¶ 30 Plaintiffs also introduced an exhibit entitled "Fire Risk in Fatal Rear Collision Accidents." This list was compiled by Ford in 2002. The statistics indicate that between 1985 and 1997, the Lincoln Town Car had a fatal collision with fire rate per 100,000 registered vehicle years of 0.107, which Arndt agreed meant that there was one fatal collision with fire for every one million registered vehicle years of driving. Between 1985 and 1990 the Ford Escort, a small front-wheel-drive car with a forward-of-the-axle tank had a fatal collision with fire rate of 0.030 which meant that there was only a 0.3 fatal collision with fire for every one million registered vehicle years of driving. There was no evidence of the cause of any of these fires or evidence of what the rate would have been in 1993 at the time the Lincoln Town Car was manufactured.

¶ 31 3. *Alternative Feasible Design*

¶ 32 Arndt testified that at the time Ford manufactured the Lincoln Town Car, a safer, more practical location for the fuel tank would have been forward of the axle. As evidence of an alternative feasible location for the fuel tank, Arndt performed two different crash tests in 2004 on a 1992 Ford Thunderbird with a forward-of-the-axle tank at 54 and 75 miles per hour. The trunk was packed with various items to simulate those items located in the

Jablonski trunk at the time of the accident. The crash tests revealed no punctures to the fuel tank and no indication that any components punctured the tank.

¶ 33 On cross-examination, Arndt acknowledged that an automobile designer cannot merely design for rear impacts, but must also consider impacts from other angles. Arndt did not crash test the Thunderbird in a side-impact scenario and did not compare how the Lincoln Town Car would do in a side-impact or front-impact crash. He agreed that a Town Car has advantages in a side-impact collision because the tank is protected between the two rear wheels and the rear frame. Arndt also acknowledged that the Thunderbird and the Town Car are distinct vehicles. The Thunderbird is a two-door coupe and the Town Car is a four-door sedan. The Town Car is also considerably larger and weighs more. Arndt acknowledged that locating the tank forward of the axle would require Ford to completely redesign the vehicle and that cost would be a consideration in evaluating that decision.

¶ 34 As additional evidence of an alternative feasible design, Arndt explained that in the 1957 Skyliner, a rear-wheel drive, large vehicle, Ford placed the fuel tank in an over-the-axle location to accommodate space for a hard-top convertible.

¶ 35 4. *Other Evidence Regarding Industry Standards*

¶ 36 Arndt also testified that by 1991 all manufacturers were designing their new model vehicles with fuel tanks located forward of the axle and Ford's global architectural plan as of 1989 indicated that all new models would have fuel tanks located forward of the axle. In 1981, Ford began moving the fuel tank in various models to a forward-of-the-axle location. By 1991, the only vehicles still designed by Ford with a fuel tank located aft-of-axle were the Mustang and the Panther platform vehicles.

¶ 37 Arndt agreed that a manufacturer cannot prevent every postcollision fire from occurring in a vehicle and that a fuel tank cannot be designed to be completely fireproof. Rather, the manufacturer is responsible for a design that "holds the fuel integrity of the vehicle." He acknowledged that the 1993 Lincoln Town Car satisfied the federal motor vehicle safety standards for fuel integrity applicable to 1993 model vehicles and that Ford exceeded that standard with its own heightened 50-miles-per-hour crash testing.

¶ 38 B. Failure to Shield to Prevent Punctures by Trunk Contents

¶ 39 It was Arndt's further opinion that if Ford chose not to relocate the tank, it should have provided shielding either inside the trunk or between the trunk and the tank that would have protected the trunk from contents puncturing the back of the fuel tank. Additionally, Ford should have provided a device in the trunk that would force trunk contents to be aligned laterally in the trunk. Plaintiffs introduced testimony that Ford had used shielding on its fuel tanks in some vehicles since the 1970s and that shielding generally was technically and economically feasible to use. However, when asked about shielding that would have specifically protected the tank from puncture from trunk contents, Arndt stated that he did not have a design that was "proven out by crash testing or some sort of design process."

¶ 40 C. Failure to Warn of the Risk of Trunk Contents Puncturing the Tank

¶ 41 With respect to the failure to warn, Arndt testified that at the time of manufacture, Ford should have provided the consumer with a warning of the risk that objects in the trunk could puncture the fuel tank, along with directions on how to align trunk contents laterally to avoid puncture to the tank because the danger was "clearly known." Arndt acknowledged that between 1979 and 1993 there were millions of Panther platform vehicles sold and, as of 1993, there were zero incidents of trunk contents puncturing the tank. As of 1993, he was not aware of any incident with other Ford model vehicles or any other manufacturer's vehicles where trunk contents had punctured the tank. Additionally, Arndt conceded that as of 1993, there were no other manufacturers warning customers on how to pack their trunks.

¶ 42 D. Failure to Inform About Postsale Remedial Measures

¶ 43 Plaintiffs also introduced evidence at trial, over Ford's repeated objection, regarding Ford's failure to inform the Jablonskis of certain postsale remedial measures taken in 2002. Plaintiffs' theory was that because Ford became aware of certain problems and voluntarily undertook certain measures with respect to the Crown Victoria Police Interceptor, it should have also informed its civilian customers about those measures. Subsequent to the sale of the Town Car, but prior to the Jablonski accident, law enforcement agencies became aware of high-speed rear-end collisions in which police officers were injured or killed in postcrash fires in Crown Victoria Police Interceptors. As a result of these incidents, police agencies complained to Ford and the National Highway Transportation Safety Administration (NHTSA).

¶ 44 In October 2001, the NHTSA opened an investigation into postcrash fires in Ford's Panther platform vehicles. After completing its investigation in 2002, the NHTSA found that Crown Victoria Police Interceptors, compared to civilian Panther platform vehicles, "have a much greater exposure to high-energy rear impacts due to the nature of their use as blocker vehicles at crash scenes or during routine traffic stops along high-speed public roads." The NHTSA required no action by Ford nor did it prohibit the "aft-of-axle" fuel tank design.

¶ 45 When asked to comment on the NHTSA's findings, Arndt agreed that "it would not be a good idea to dictate a fuel tank location because you can *** make a bad fuel tank in a good location *** and I suppose *** you could probably make a good fuel tank in any location." The NHTSA additionally found that "the structural and component design is a more critical factor than fuel tank location in maintaining fuel system integrity." Arndt agreed with this statement in part, but continued to identify fuel tank location as an important consideration.

¶ 46 During 2002, government officials in various jurisdictions had opened investigations as a result of police officer deaths. In June of 2002, Ford announced the formation of a "Crown Victoria Police Interceptor Blue Ribbon Panel." This panel consisted of Ford and law enforcement representatives committing to a 90-day program to evaluate fuel system upgrades and police procedures as a part of a "Police Officer Safety Action Plan." In September of 2002, the Blue Ribbon Panel announced certain remedial measures, including

the creation of an "Upgrade Kit," which consisted of shields designed to protect the fuel tank from puncture by component parts in high-speed rear-end collisions. All experts agreed that the Upgrade Kit would not have prevented the Jablonski accident.

¶ 47 The panel also announced the creation of a "Trunk Pack," for the Police Interceptor consisting of a drop-in trunk liner made of high-density polyethylene, which ensures the user places objects in the trunk laterally rather than longitudinally. Arndt acknowledged that the "Trunk Pack" was designed for the Police Interceptor and he was not recommending that particular design for civilian use or in the Lincoln Town Car. A sticker located on the "Trunk Pack" instructed the user to "align hard or sharp police equipment laterally."

¶ 48 The panel also announced recommendations for police safety procedures, including "Trunk Packing Considerations for Police Vehicles." These Trunk Packing Considerations advised officers on items not to carry in the trunk and advised them regarding the placement of other items in the trunk to reduce the potential for fuel tank rupture by trunk contents. Finally, Ford announced the development of a website where the law enforcement community and the general public could find information about the upgrades to the Police Interceptor.

¶ 49 In October of 2002, Ford informed by mail all the registered owners of Police Interceptors and all the Ford, Lincoln, and Mercury dealers in the United States about the availability of the upgrade kit. In March of 2003, Ford also notified its 32,000 governmental fleet customers regarding the upgrade kit. In May 2003, the police and Police Interceptor customers were notified by mail that the Trunk Pack could be ordered through a Ford dealer. According to the website, a direct mailing to fleet customers informing them of the availability of the Trunk Pack was to take place in June 2003, and shipments of the product to dealers were to begin on June 16, 2003, about three weeks before the Jablonski accident. The Trunk Packing Considerations were available only through the website and with the purchase of the Interceptor Trunk Pack. Civilian owners of Panther platform vehicles, including the Jablonskis, received no notice of the availability of the Trunk Pack or the Trunk Packing Considerations.

¶ 50 Sue Cischke, a vice president of Ford and the highest ranking Ford employee responsible for vehicle safety, made the decision not to notify civilian users of these measures because it was Ford's opinion that the risk of fuel-fed, postcrash fires in high-speed rear-impact collisions is unique to police users because police officers have significantly greater exposure in severe highway collisions. However, with respect to the Trunk Packing Considerations, she admitted at trial that of the articles Ford warned police that carrying in the trunk was not recommended, some could potentially be present in civilian cars.

¶ 51 II. Ford's Evidence

¶ 52 After the circuit court denied its motion for a directed verdict on all grounds of negligence, strict liability, and punitive damages, Ford presented countering documentary evidence and testimony. Ford's primary theory was that its conduct in locating the fuel tank vertically behind the axle was not unreasonable, as it was in the best location for that vehicle considering the overall design of the vehicle and that changing the location would reduce the

effectiveness of other desirable attributes of the vehicle.

¶ 53 In support of its theory, Ford introduced evidence that it met all relevant safety standards with regard to fuel integrity, that it did not violate the standard of care in the industry, and that the fuel tank puncture by the pipe wrench was such a rare, unique, and unforeseeable occurrence that no manufacturer could anticipate or design against such an occurrence. Ford presented evidence that prior to the time of sale, no Panther platform vehicle was ever subject to punctures from trunk contents. Further, prior to the Jablonski accident, no civilian vehicle was ever subject to a fuel tank puncture. Millions of Ford Panther platform vehicles had been driven for years with a small incidence of postcrash fires.

¶ 54 Ford's experts opined that there is no optimum fuel tank location for all vehicles. Rather, the design of a fuel system depends upon the design of the overall car structure and considerations regarding impacts from various directions. It was their opinion that it is important to consider that the body-on-frame design of the Panther platform has different package space and different strengths that interact with the location of the fuel tank. These qualities make the location of the tank for that car different from what might be the best location for a front-wheel drive, unit body, or smaller car. If the fuel tank were moved in the Panther platform vehicles to the forward-of-the-axle location, the body-on-frame construction and rear-wheel drive would have to be eliminated, making it a totally different car. In the defense experts' opinion, the vertical behind-the-axle tank was the best and safest design for the 1993 Lincoln Town Car and provided the most protection from all types of crashes.

¶ 55 Ford introduced statistical data including data indicating that 99.9993% of all Town Cars made from 1992 to 2001 had never been involved in a fatal rear-end collision with fire. Similarly, considering all Panther platform vehicles made in that same 10-year period, 99.9993% had never been involved in a fatal rear collision with fire. By 2003, there were about 15 million vehicles still on the road that were manufactured in 1993 with aft-of-axle tanks. With respect to the other 416 accidents introduced by plaintiffs, Ford's experts indicated that none were relevant to consider because they were cars of a different era, built to different safety standards and performed differently in a crash.

¶ 56 A. Compliance With Federal Motor Vehicle Safety Standards

¶ 57 The NHTSA is the federal agency responsible for implementing federal highway safety laws. The NHTSA specifically promulgates the Federal Motor Vehicle Safety Standards required for fuel system integrity. Ford presented evidence that at the time of manufacture, the 1993 Lincoln Town Car satisfied the applicable version of Safety Standard 301, which required 1993 model-year vehicles to withstand, with minimal fuel leakage, a rear impact at 30 miles per hour from a nondeformable, 4,000-pound barrier. Ford also introduced evidence of its own internal higher fuel integrity standards which involved car-to-car crash testing at 50 miles per hour from three different angles.

¶ 58 According to Ford's experts, these standards were more stringent than Safety Standard 301, and more rigorous than most standards used by any other vehicle manufacturers at the time. In 2000, the NHTSA rejected a proposal from some advocacy groups that the NHTSA

regulate the location of fuel tanks, requiring them to be forward of the axle. The NHTSA explained that "such a requirement is unnecessary and would be design restrictive," noting that "the structural and component design is a more critical factor than fuel tank location in maintaining fuel system integrity."

¶ 59 Ford additionally sought to introduce evidence that in 2004, the NHTSA adopted a more stringent version of Safety Standard 301, requiring it to withstand a 50-mile-per-hour crash test, and that the 1993 Lincoln Town Car satisfied the new standard promulgated more than a decade after the car was manufactured. The circuit court excluded this evidence.

¶ 60 B. Over-the-Axle Design Not Workable

¶ 61 With respect to the design of the 1993 Lincoln Town Car, Ford introduced evidence from its employee Jack Ridenour, a mechanical engineer and fuel system designer who joined the fuel system design group at Ford in 1971. He testified that the over-the-axle location advocated by Severy did not show that the vertical-behind-the-axle tank location was an unsafe dangerous location. Ridenour stated that the research done by Severy in the late sixties advocated the over-the-axle design as superior to the under-the-trunk location. He testified that the over-the-axle tank location addressed by Severy and Daniels ultimately proved unworkable.

¶ 62 Based on Severy's research it was thought at the time that the over-the-axle tank location was superior to the under-the-trunk location. Ford's European designed Caprice was held up as an example of how to implement that design effectively and was manufactured until 1972. The advantages of that design were that it was farther away from the rear bumper and provided more crush space behind the fuel tank. Also, the tank would not be exposed to the under-vehicle environment and road hazards.

¶ 63 Ridenour testified that the cost estimate for the over-the-axle tank and placement of a metal barrier to protect the passenger compartment had nothing to do with the 1993 Lincoln Town Car fuel system, fuel tank location, or the way it was executed. Rather, he stated that the 1971 cost estimate showed the increased costs associated with the metal barrier for the over-the-axle tank.

¶ 64 He was not aware of any manufacturer who was ever able to accomplish the design concepts of Severy and Daniels in a workable design. Ford crash test results for this design revealed that the impact forces on the passenger compartment and the occupants were unsatisfactory. Therefore, the Caprice was discontinued in 1972 and Ford discontinued the use of the over-the-axle tank location. Ford's expert testified that the 1957 Skyliner had a different frame structure and was not a crashworthy design that would have passed fuel safety standards in 1993. The disadvantages of the over-the-axle design included a susceptibility to damage in override collisions, the risk that gasoline vapors could collect in the passenger area of the vehicle presenting a combustion hazard, the inability to separate the tank from the passenger compartment with a metal barrier, and a risk that trunk contents could puncture the fuel tank.

¶ 65 C. Vertical Behind the Axle Best Location for Town Car

¶ 66 Ridenour testified that the Panther vehicle is executed with a steel floor pan that totally isolates the tank from the interior of the vehicle, the passenger compartment and the trunk and that forms a barrier between any trunk contents and the tank. He testified that the vertical-behind-the-axle design also incorporates the positive attributes of the over-the-axle location. The vertical design of the Town Car tank is about the same distance away from the rear bumper as the over-the-axle tank. Also, similar to the over-the-axle location, the vertical-behind-the-axle location is also between the area cradled by the rear wheels. It is well protected in side crashes by the heavy axle structure and suspension of a rear-wheel-drive vehicle. Severy indicated that this location was least often compromised from collisions of all types.

¶ 67 Ford also introduced evidence that there are advantages and disadvantages to the forward-of-the-axle location. Specifically, Ford's experts addressed the advantages to that tank location in a front-wheel-drive vehicle with a smaller "unit body" car where there are more options with respect to the placement of the fuel tank. Body-on-frame cars have a different package space and are rear-wheel drive, which has certain benefits. A disadvantage of the forward-of-the-axle location is the fill pipe because the longer the pipe, the more vulnerable it is in a crash. Also, the forward-of-the-axle tank is more susceptible to damage in side-impact crashes.

¶ 68 Ford's experts believed that the tank design in the 1993 Town Car was the best location for that particular car because the tank is well forward of the bumper, providing a lot of crush space in the back of the car. It is below the vehicle floor and separated from the inside of the vehicle and allows for a short fill pipe. The tank is inside the frame rails, which are very strong, and the axle is able to move forward, creating space for the fuel tank to move forward which is an advantage in certain types of crashes.

¶ 69 D. Accident Was Unforeseeable

¶ 70 With respect to the cause of the accident and whether it was foreseeable, Ford presented expert testimony that the cause resulted from a combination of necessary and sufficient conditions that had to occur for this accident to have happened. Those factors included the speed of the vehicle that struck the Town Car, the configuration of that vehicle, the exact alignment of those vehicles at the time of impact, the exact location and longitudinal alignment of the pipe wrench in the trunk on impact, the type of trailer hitch on the Town Car, and other factors that caused the pipe wrench to penetrate the fuel tank. Out of millions of Town Cars on the road, it was the only known accident in which the fuel tank had been penetrated by trunk contents and the only known non-police-vehicle incident considering all Panther platform vehicles. Ford's experts believed that the incident was so rare that the risk of trunk contents puncturing the fuel tank should be given little consideration in fuel system design.

¶ 71 E. Proposed Shielding Was Unworkable

¶ 72 With respect to the proposed shielding of the trunk wall advocated by Arndt, the Interceptor Trunk Pack was tested in the Crown Victoria Police Interceptor and proved

effective in preventing trunk contents from puncturing the trunk. Ford's expert testified that based on his testing, a Kevlar backing in the trunk might have added strength, but would not have prevented the pipe wrench from puncturing the tank in this particular accident. Additionally, he testified that there was no feasible guarding system for the rear of the tank that would have prevented the pipe wrench from penetrating the tank. A metal barrier could be designed in between the trunk wall and the tank, but would likely puncture the tank in a side-impact collision. Therefore, the design would make the overall safety worse compared to this remote event. He testified that there was no alternative feasible shield design that would have prevented this particular accident.

¶ 73 III. Procedural History at the Close of the Evidence

¶ 74 At the close of the evidence, Ford renewed its motion for a directed verdict on all theories and grounds of recovery. Plaintiffs then voluntarily dismissed their strict liability count with prejudice and Ford moved for a mistrial claiming that "substantial evidence was presented in this case under the guise that it was relevant in a strict liability claim." Ford particularly argued it was prejudiced by the postsale conduct introduced into evidence. The circuit court denied the motion for a mistrial and for a directed verdict.

¶ 75 Thereafter, during the instructions conference, the circuit court accepted plaintiffs' issues instruction, which provided for the fourth, yet unpleaded theory that Ford was negligent in "failing to inform of the existence of the Trunk Pack and/or Trunk Pack Recommendations." With regard to the fourth theory, Ford again objected to any postsale duty to warn and argued that plaintiffs never pleaded a postsale duty to warn. Plaintiffs then sought leave to amend their pleadings to conform them to the proof adduced at trial, which the circuit court granted over Ford's objection. No pleading was tendered to the court until after judgment.

¶ 76 The circuit court gave a non-Illinois Pattern Jury Instruction (IPI) relying on the Restatement (Third) of Torts: Products Liability § 10 (1998), regarding a postsale duty to warn and another non-IPI instruction directing the jury that Ford "could be liable for voluntarily undertaking to provide a post-sale warning to some customers but not to others." The circuit court additionally rejected Ford's proposed special interrogatories, all of which plaintiffs objected to on the basis of improper form.

¶ 77 After closing arguments, the jury returned a general verdict awarding Dora Mae Jablonski compensatory damages totaling $23.1 million and awarding punitive damages in the sum of $15 million. The jury also awarded compensatory damages to the estate in excess of $5 million.

¶ 78 Thereafter, over Ford's objections, between May and November 2005, plaintiffs were granted three opportunities to amend the pleadings to conform them to the proof at trial. The sixth amended complaint alleged that Ford was negligent for the additional reason that it failed "to inform the plaintiffs of the existence of the Trunk Pack and/or trunk pack recommendations even though Ford had voluntarily undertaken to inform police consumers of the existence of the trunk pack and/or trunk pack recommendations." The trial court subsequently denied Ford's motion for a judgment notwithstanding the verdict or alternatively for a new trial.

¶ 79 On appeal, the appellate court affirmed the judgment. This court granted Ford's petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010). In addition, pursuant to Supreme Court Rule 345 (Ill. S. Ct. R. 345 (eff. Sept. 20, 2010)), we allowed the Illinois Trial Lawyers Association (ITLA) to file a brief *amicus curiae* on behalf of plaintiffs. We also permitted Caterpillar, Inc., and the Alliance of Automobile Manufacturers to file briefs as *amici curiae* on behalf of Ford.

¶ 80 ANALYSIS

¶ 81 Although Ford raises numerous issues for our review, as an initial matter, to answer these questions, we must first clarify the duty analysis in a negligent-product-design case, and specifically address the application of the risk-utility test in determining the duty of care.

¶ 82 We begin our discussion by setting forth the general principles applicable to a negligent-product-design case. A product liability action asserting a claim based on negligence, such as negligent design, is based upon fundamental concepts of common law negligence. *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 270 (2007). As in any negligence action, a plaintiff must establish the existence of a duty, a breach of that duty, an injury that was proximately caused by that breach, and damages. *Heastie v. Roberts*, 226 Ill. 2d 515, 556 (2007).

¶ 83 The determination of whether a defendant owes a duty to a plaintiff is a question of law, reviewed *de novo*. *Thompson v. Gordon*, 241 Ill. 2d 428, 438-39 (2011). A manufacturer has a nondelegable duty to design a reasonably safe product. *Calles*, 224 Ill. 2d at 270. Thus, the key question in a negligent-design case is whether the manufacturer exercised reasonable care in designing the product. *Id*. "In determining whether the manufacturer's conduct was reasonable, the question is 'whether in the exercise of ordinary care the manufacturer should have foreseen that the design would be hazardous to someone.' " *Id.* at 271 (quoting American Law of Products Liability 3d § 28:48, at 28-66 (1997)). To show that the harm was foreseeable, the plaintiff must show that "the manufacturer knew or should have known of the risk posed by the product design at the time of manufacture" of the product. *Id.*; *Sobczak v. General Motors Corp.*, 373 Ill. App. 3d 910, 923 (2007).

¶ 84 It has long been held that whether the manufacturer exercised reasonable care in designing its product also encompasses a balancing of the risks inherent in the product design with the utility or benefit derived from the product. Restatement (Second) of Torts § 291, at 54 (1965) ("[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."). When the risk of harm outweighs the utility of a particular design, there is a determination that the manufacturer exposed the consumer to a greater risk of danger than is acceptable to society. Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 610 (1980) ("[c]onceptually and analytically, this approach bespeaks negligence").

¶ 85 In the context of a strict liability design-defect case, we have previously set forth a nonexhaustive list of factors derived from various authorities that may be relevant to the risk-utility analysis. These factors include evidence of (1) the availability and feasibility of alternate designs at the time of the product's manufacture; or (2) that the design used did not

conform to the design standards in the industry, design guidelines provided by an authoritative voluntary organization, or design criteria set by legislation or governmental regulation. *Calles*, 224 Ill. 2d at 263-64 (quoting *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368 (1979)). Other factors that may be relevant include the utility of the product to the user and to the public as a whole, the safety aspects of the product including the likelihood that it will cause injury and the probable seriousness of the injury, and the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. *Id.*; see also *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 555 (2008) (finding the risk-utility formulation in the Restatement (Third) of Torts: Products Liability § 2, cmt. f, at 23 (1998), to be instructive in a design defect case).

¶ 86 In *Calles*, we concluded that risk-utility balancing remains operative in determining whether a defendant's conduct is reasonable in a negligent-design case. *Calles*, 224 Ill. 2d at 269 ("the conclusion that the risk-utility test is not applicable in negligent-product-design cases is not binding precedent"). Numerous commentators have concurred that the balancing test developed for strict liability claims, which examines whether a product is unreasonably dangerous, is essentially identical to the test applied in determining whether a defendant's conduct in designing a product is unreasonable and that any distinction is mere semantics. See Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 Marq. L. Rev. 7, 12 (2006) ("There simply is no difference between reviewing the conduct of the manufacturer and the product design. Ultimately, products are neither reasonable nor unreasonable; they are deemed so only because a human fact-finder utilizing risk-utility tradeoffs decides one way or another on the issue."); William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. Ill. L. Rev. 639, 654 ("[C]ourts have had to expend considerable energy trying to explain how defectiveness under the risk-utility test differs from negligence. The effort has been far from successful."); see also *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 118 (2005) (Fitzgerald, J., specially concurring, joined by McMorrow, C.J.) (noting that the risk-utility test in strict liability and the approach used in administering traditional reasonableness standard of negligence appear to be coextensive).

¶ 87 There are a myriad of factors that may be relevant to the balance, and they may vary depending upon the unique facts and circumstances of each case. In applying the balancing test, the court must initially balance factors it finds relevant to determine if the case is a proper one to submit to the jury. *Calles*, 224 Ill. 2d at 266 (citing Restatement (Third) of Torts: Products Liability § 2, Reporters' Note, cmt. f, at 94 (1998)). Once this threshold determination has been met, the issue is then for the fact finder to determine the weight to be given any particular factor, and its " 'relevance, and the relevance of other factors, will vary from case to case.' " *Calles*, 224 Ill. 2d at 266 (quoting Restatement (Third) of Torts: Products Liability § 2, cmt. f, at 23 (1998)). With these principles in mind, we now consider Ford's specific contentions.

¶ 88 Ford contends that it is entitled to a judgment notwithstanding the verdict on plaintiffs' first three theories of negligence because plaintiffs failed to present sufficient evidence that it breached any recognized standard of care and, therefore, insufficient evidence to justify submitting any of their negligence claims to the jury. "[V]erdicts ought to be directed and

judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). In other words, a motion for judgment *n.o.v.* presents " 'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.' " *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942)). We review *de novo* the trial court's decision denying Ford's motion for judgment notwithstanding the verdict. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 100 (2010).

¶ 89 I. Compliance With Industry Standards

¶ 90 Ford initially argues that its compliance with industry standards alone is dispositive of its duty in a negligent-design claim. Ford relies on the proposition of law in *Blue*, that a claim for negligent design requires proof that the "defendant deviated from the standard of care that other manufacturers in the industry followed." *Blue*, 215 Ill. 2d at 96 (plurality op.). As we explained, this view does not represent the appropriate duty analysis in a negligent-design claim.

¶ 91 Although the plurality opinion in *Blue* suggests that conformance to an industry standard is dispositive on the issue of negligence (see *Blue*, 215 Ill. 2d at 100), as we explained in *Calles*, that language is not binding authority (*Calles*, 224 Ill. 2d at 269) and is contrary to well-settled law in Illinois and throughout the country. Rather, we have previously held that evidence of industry standards is a factor to be considered in the balance and has always been relevant to determining whether a defendant has exercised reasonable care in designing a product. See *Ruffiner v. Material Service Corp.*, 116 Ill. 2d 53, 58 (1987); *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 331 (1965); see also *Cornstubble v. Ford Motor Co.*, 178 Ill. App. 3d 20, 39 (1988) (Calvo, J., dissenting); *Nave v. Rainbow Tire Service, Inc.*, 123 Ill. App. 3d 585, 591-92 (1984); *Denniston v. Skelly Oil Co.*, 47 Ill. App. 3d 1054, 1068 (1977); *McNealy v. Illinois Central R.R. Co.*, 43 Ill. App. 2d 460, 469-70 (1963).

¶ 92 However, the mere fact that a manufacturer adhered to all relevant industry standards does not require judgment as a matter of law. It is well settled that conformance to industry standards is relevant, but not dispositive on the issue of negligence. Restatement (Second) of Torts § 295A (1965); 1 Dan B. Dobbs, The Law of Torts § 164, at 397 (2001); Prosser and Keeton on Torts § 33, at 195 (W. Page Keeton *et al.* eds., 5th ed. 1984). See also *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."). Similarly, evidence of a violation of industry standards is considered probative of, but not conclusive on, the question of negligent design. The standard remains whether the conduct was reasonable under the circumstances. *Calles*, 224 Ill. 2d at 270; *Modelski v. Navistar International Transportation*

Corp., 302 Ill. App. 3d 879, 887 (1999).

¶ 93 Moreover, we note that Ford understood this to be the standard. During the motions *in limine* conference, plaintiffs sought to limit Ford from introducing evidence regarding governmental safety standards. In arguing the motion, Ford stated:

> "We do not intend to say [to] the jury that because [we] complied with Federal Motor Vehicle Safety Standards, therefore we win the case, okay. It is, we are entitled to show the standard, what it is, that we complied with it. And it is *** evidence of due care. And it is evidence, but it is not dispositive and we are not going to argue it is dispositive."

¶ 94 Additionally, in opening statements Ford acknowledged that compliance with industry standards was not conclusive evidence of reasonableness but, rather, that it "used the federal standards as one of their criteria." Ford stated that "this doesn't dispose of the issue, but it is an indication." Accordingly, Ford's contention that compliance with industry standards is dispositive of a negligent-product-design claim lacks merit.

¶ 95 II. Application of the Risk-Utility Balancing Test

¶ 96 We next consider Ford's contention that it was erroneously held to a higher duty of care than reasonable care, requiring it to design out, guard against, and warn of every conceivable risk. A manufacturer is not required to guard against every conceivable risk, regardless of the degree of harm. *Cunis v. Brennan*, 56 Ill. 3d 372, 376 (1974). Rather, as we explained, plaintiff was required to produce evidence that Ford's conduct in designing the fuel system was unreasonable by presenting evidence that the risk was foreseeable and that the risks inherent in the product design outweighed the benefits. *Calles*, 224 Ill. 2d at 270-71.

¶ 97 It was uncontradicted that the 1993 Lincoln Town Car satisfied the specific federal fuel system integrity standards promulgated by the NHTSA for rear-end collisions and exceeded that standard with Ford's own internal 50-miles-per-hour crash testing. It was Arndt's opinion that the ability to maintain fuel system integrity was the standard by which to measure the reasonable design of the fuel system. It was also uncontradicted that it was an accepted industry practice in 1993 to locate the fuel tank aft of axle, as other manufacturers in the industry, including Audi, BMW, Chrysler, General Motors, and Volvo, continued to manufacture vehicles with aft-of-axle fuel tanks at that time. After investigating the 1993 Lincoln Town Car, the NHTSA chose not to mandate a different location for the tank, concluding that "the structural and component design is a more critical factor than fuel tank location in maintaining fuel system integrity."

¶ 98 Given that Ford complied with, and even exceeded, the industry standard set for fuel system integrity, plaintiffs were required to come forward with evidence that despite Ford's compliance, its conduct was otherwise unreasonable because the foreseeable risk posed by the vertical-behind-the-axle design of the fuel tank at the time of manufacture outweighed its utility.

¶ 99 Plaintiffs sought to establish that Ford's conduct in designing the fuel tank was unreasonable because at the time of manufacture, there was a safer alternative feasible tank design either over the axle or forward of the axle. Arndt believed that forward of the axle was

the safest tank location "a fair amount of the time" and presented evidence of a successful crash test with a 1992 Thunderbird with a forward-of-the-axle tank.

¶ 100 Nevertheless, Arndt acknowledged that other variables must also be considered in evaluating the design of a fuel system. Arndt agreed the structure and component design of the particular vehicle are important considerations in maintaining fuel system integrity. The Lincoln Town Car was a heavy-duty six-passenger vehicle, with a deep-well trunk, a body-on-frame construction, which aided in the absorption of energy in a collision, and a solid rear axle, which was less susceptible to damage and less expensive to repair than an independent rear suspension. Arndt additionally acknowledged that an automobile designer must consider collision impacts from all angles. The uncontradicted evidence presented was that the design of the Lincoln Town Car had advantages over the Thunderbird in side-impact collisions.

¶ 101 It was also uncontradicted that moving the tank would have required Ford to completely redesign the vehicle, and would have introduced other risks of equal or greater magnitude, including fuel-fed fires from the filler pipe and tank rupture from other parts of the vehicle.

¶ 102 The over-the-axle tank had its own safety risks. That location was discontinued by Ford in 1972, and by 1994, no other manufacturer in the industry was manufacturing vehicles with an over-the-axle tank. "It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also introduce into the product other dangers of equal or greater magnitude." Restatement (Third) of Torts: Products Liability § 2, cmt. f, at 23 (1998).

¶ 103 Ultimately, Arndt agreed with the NHTSA's conclusion that it was appropriate not to dictate fuel tank location because, as he stated, "you could probably make a good fuel tank in any location." Accordingly, the evidence presented regarding an alternative feasible design did not support the conclusions that Ford's conduct in locating the fuel tank in the vertical-behind-the-axle location in the 1993 Lincoln Town Car was unreasonable. Plaintiffs must show more than the technical possibility of an alternative design.

¶ 104 Plaintiffs also introduced the Severy research, Ford's internal engineering recommendations from the late 1960s and early 1970s advocating an over-the-axle tank location, and the costs associated with moving the tank to that location. However, these recommendations were made a decade before the Panther platform was introduced. The reasonableness of the vertical-behind-the-axle design for a fuel tank was not considered at that time. Rather, Severy found that the under-the-trunk tank location, inches from the rear bumper, was unsafe because it exposed the tank to rupture at low speeds. Instead, the alternative over-the-axle location was thought by Severy to be "an improved location." Thus, this evidence was relevant to the risks associated with the under-the-trunk location and the need to move the tank from that location. It was not evidence from which the jury could conclude that Ford's conduct was unreasonable with respect to an entirely different fuel tank location ultimately chosen for this particular vehicle a decade later which was never tested in Severy's research.

¶ 105 Plaintiffs also introduced evidence that Ford was aware of the potential for trunk contents to puncture the fuel tanks in other designs that Ford ultimately chose not to adopt. However, the risk was so remote that it had never manifested itself with respect to this design in the 15

years that millions of Panther platform vehicles were on the road prior to 1993. Nor was Arndt aware of any accident prior to 1993 involving any vehicle made by any manufacturer where any object in a trunk had ever punctured a fuel tank. Plaintiffs also introduced 416 purportedly substantially similar accidents in support of its contentions. However, there was no evidence that in any of these incidents trunk contents ever punctured the tank in a Panther platform vehicle or in any other vehicle manufactured by Ford or any other manufacturer as of 1993.

¶ 106 Additionally, with respect to shielding, although not required to develop a specific prototype, it was incumbent upon plaintiffs to present evidence that there was a shield that was feasible to prevent trunk contents from puncturing the tank in the 1993 Lincoln Town Car. Regarding the possibility of a shield that would be fitted over the fuel tank, Arndt "mocked up" a shield that would conceivably fit on the tank, but stated that it was not "proven out by crash testing or some sort of design process." With respect to the existence of the optional Kevlar Trunk Pack designed for the Crown Victoria Police Interceptor in 2002, Arndt conceded that the Trunk Pack designed for that vehicle was not appropriate for the 1993 Lincoln Town Car. Although Ford's crash testing at 75 miles per hour revealed that the Upgrade Kit shielding developed to prevent punctures from the component parts surrounding the tank was effective, the experts all agreed that the Upgrade Kit would not have prevented the ruptures that occurred in the Jablonski accident. Accordingly, there was insufficient evidence of a shield that would have been feasible to prevent this accident from occurring.

¶ 107 In sum, after balancing the foreseeable risks and utility factors, plaintiffs failed to present sufficient evidence from which a jury could conclude that at the time of manufacture, Ford's conduct was unreasonable or that it had acted unreasonably in failing to warn about the risk of trunk contents puncturing the tank. It complied with the industry standard for fuel system integrity, it exceeded that standard by its own heightened crash-testing standards, other manufacturers in the industry continued to produce vehicles with aft-of-axle fuel tanks, and despite the clear gravity of the injury, the risk was extremely remote. Additionally, there was no evidence of a feasible shield that would have prevented the injury in this case. Accordingly, there was insufficient evidence to justify the submission of plaintiffs' first three claims of negligence to the jury.

¶ 108 III. Postsale Duty to Warn

¶ 109 We next consider Ford's various contentions regarding plaintiffs' fourth theory of negligence. Specifically, Ford maintains that plaintiffs' fourth theory of negligence, which was never pleaded before trial, is premised upon a postsale duty to warn which is contrary to Illinois law. Under plaintiffs' fourth theory, the jury was instructed that it could find Ford negligent for its failure to "inform of the existence of the Trunk Pack and/or Trunk Pack recommendations." Ford developed these measures a decade after the sale of the 1993 Lincoln Town Car.

¶ 110 We initially reject plaintiffs' argument that Ford has forfeited any claim of error on the postsale duty to warn issue. The pretrial and trial record is replete with instances where Ford

raised the lack of a postsale duty and challenged the relevance of the postsale testimony in relation to its duty to the consumer at the time of manufacture.

¶ 111 With respect to the merits, under established Illinois precedent, when a design defect is present at the time of sale, the manufacturer has a duty to take reasonable steps to warn at least the purchaser of the risk as soon as the manufacturer learns or should have learned of the risk created by its fault. *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 33-36 (1980) (duty to warn if manufacturer knew or should have known of the danger at the time of sale); *Carrizales v. Rheem Manufacturing Co.*, 226 Ill. App. 3d 20, 34 (1991) ("Illinois law has been reluctant to impose a duty to warn beyond the time when the product leaves the manufacturer's control unless the manufacturer knew or should have known at that time that the product was defective."); *Kempes v. Dunlop Tire & Rubber Corp*., 192 Ill. App. 3d 209, 218 (1989).

¶ 112 Nevertheless, "a manufacturer is under no duty to issue postsale warnings or to retrofit its products to remedy defects first discovered after a product has left its control." *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 890 (1999); *Carrizales*, 226 Ill. App. 3d at 34; *Collins v. Hyster Co.*, 174 Ill. App. 3d 972, 977 (1988) ("[T]he law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacture expertise that was not present at the time the product left its control.").[1]

¶ 113 Plaintiffs argue that their fourth theory has always been premised upon a continuing duty to warn at the time the car was manufactured, and thereafter. Specifically, they argue that if a manufacturer knew or should have known of the hazard at the time of manufacture, establishing a duty to warn when the product left its control, that duty to warn is then a continuous one.

¶ 114 The appellate court agreed and found that plaintiffs' theory was based upon a continuous duty to warn. We do not quarrel with the statement of the law recognizing a continuing duty to warn. We reiterate, as the appellate court noted in *Modelski*, a continuing duty may be imposed if at the time of manufacture of the product the manufacturer knew or should have known of the hazard.

¶ 115 Nevertheless, that theory was not presented to the jury at trial. During the hearing on Ford's motion for a directed verdict, plaintiffs specifically noted that the evidence pertaining to subsequent remedial measures was admissible to support "a post-sale duty to warn."

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[1] A duty may be imposed upon a manufacturer by a statute or administrative regulation which mandates the recall of the product, under circumstances where the dangerous characteristic of the product is not discovered until after the product has left the manufacturer's control. *Modelski*, 302 Ill. App. 3d at 889; see also Restatement (Third) of Torts: Products Liability § 11 (1998) (addressing the duty in the context of a recall). However, in the absence of such an obligation, or a voluntary undertaking, Illinois has not imposed such a duty on a manufacturer in the context of product design or specifically failure to warn. But see, *e.g.*, *Proctor v. Davis*, 291 Ill. App. 3d 265, 278 (1997) (in the context of pharmaceutical products duty to notify the medical profession of additional side effects discovered from product's use).

Moreover, the jury instruction proffered by plaintiffs does not comport with a continuing duty to warn theory. Rather, over Ford's objections, the trial court submitted the following non-IPI instruction to the jury:

> "One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonably careful person in the seller's position would provide such a warning under the circumstances.
>
> A reasonably careful person in the seller's position would provide a warning after the time of sale if:
>
> The seller knows or reasonably should know that the product poses a substantial risk of harm to persons; and
>
> Those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> A warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> The risk of harm is sufficiently great to justify the burden of providing a warning.
>
> Whether or not Ford Motor Company acted as a reasonably careful person under the circumstances of this case is for you to decide."

¶ 116 This instruction is virtually a verbatim recitation of section 10 of the Restatement (Third) of Torts: Products Liability (1998),[2] which has not been previously adopted in Illinois. As explained under comment a, section 10 specifically recognizes a "duty to warn of a product-related risk after the time of sale, *whether or not the product is defective at the time of original sale*," if a reasonable person in the seller's position would provide a warning under the enumerated circumstances. (Emphasis added.) Restatement (Third) of Torts: Products Liability § 10, cmt. a, at 192 (1998). The reporters' note to comment a specifically highlights

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[2]The Restatement (Third) of Torts: Products Liability § 10 (1998) provides:

> "(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
>
> (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
>
> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning."

that Illinois has "reject[ed] the imposition of any post-sale duty to warn if the product was not defective at the time of sale." Restatement (Third) of Torts: Products Liability § 10, Reporters' Note, cmt. a, at 198 (1998).

¶ 117 Accordingly, the jury instruction as proffered allowed the jury to find Ford negligent even if Ford had not breached a duty of care existing at the time the car was manufactured. The instruction allowed the jury to recognize a duty that could arise based upon knowledge of risks discovered after the sale of the car even if it found Ford had not acted unreasonably at the time the car was manufactured. Indeed, there was evidence admitted that Ford subsequently learned of tank punctures from trunk contents causing fuel-fed fires in Panther platform Crown Victoria Police Interceptor vehicles involved in high-speed rear-end collisions. Based upon this subsequently acquired knowledge alone, the jury could have found a postsale duty to inform of the safety improvements made nearly a decade later without ever concluding that Ford knew or should have known the product was unreasonably dangerous at the time of sale. Consequently, where plaintiffs' theory, as presented to the jury, was premised upon a duty not recognized in Illinois at the time of trial, it was legally defective and improperly submitted to the jury for its consideration. See *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 98 (2010).

¶ 118 Alternatively, plaintiffs and *amicus* ITLA ask this court to adopt section 10 and to recognize the postsale duty to warn theory articulated by the American Law Institute. Although we do not foreclose the possibility that a postsale duty to warn could be recognized in the future in Illinois, we decline the invitation to expand the duty in this case under the particular facts and circumstances presented here.

¶ 119 Even if we were to adopt the formulation as reflected in the Restatement (Third) of Torts, there was insufficient evidence presented to the jury with regard to the enumerated circumstances under which a reasonable person would provide a warning under section 10. As stated previously, the theory was never pleaded by plaintiffs prior to trial. Furthermore, required elements of such a claim included whether "[t]hose to whom a warning might be provided can be identified," and whether a warning could effectively be communicated to those persons and acted on by the consumer. ITLA suggests that Ford could have easily identified the customers and effectively communicated the warning. ITLA notes that vehicle identification numbers (VIN) are used to register vehicles and would allow for the location of the current owner. ITLA indicates that Ford could feasibly identify the VINs of vehicles for which a postsale warning should be given and that Ford could have publicized to consumers through the general media. Nevertheless, none of this evidence was specifically presented to the jury at trial on this theory, nor was Ford provided with an opportunity to dispute these circumstances as articulated under this new theory. With respect to the failure to inform of the Trunk Pack, Arndt acknowledged that it was not even suitable for the 1993 Lincoln Town Car. Accordingly, we decline to consider in this case whether Illinois should adopt a postsale duty to warn.

¶ 120 IV. Voluntary Undertaking

¶ 121 To the extent that the appellate court alternatively found plaintiffs' fourth theory of

recovery cognizable under the voluntary undertaking doctrine, we find the court erred in invoking this doctrine under these circumstances. The non-IPI instruction that plaintiffs proffered and that was submitted to the jury stated as follows:

> "A manufacturer who voluntarily undertakes to provide an after[-]the[-]sale warning to some of its customers may be subject to liability if it does not warn other customers.
>
> Whether the manufacturer's conduct in warning some of its customers and not others was reasonable under the circumstances is for you to decide."

¶ 122 The instruction was purportedly premised upon the Restatement (Second) of Torts § 323 (1965) and this court's rulings in *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69 (1964), and *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003). However, the instruction as submitted to the jury is not an accurate statement of the law. The voluntary undertaking theory as expressed in section 323 of the Restatement (Second) of Torts provides as follows:

> "§ 323. Negligent Performance of Undertaking to Render Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965).

¶ 123 As we recently reiterated, "[u]nder a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking." *Bell v. Hutsell*, 2011 IL 110724, ¶ 12 (quoting *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32 (1992)). "The theory is narrowly construed." *Id*. (citing *Frye*, 153 Ill. 2d at 33).

¶ 124 In this case, Ford's impetus for developing the optional "Trunk Pack" and the "Trunk Packing Considerations" was the result of its Crown Victoria Police Interceptor Blue Ribbon Panel under which Ford and law enforcement representatives agreed to evaluate fuel system upgrades and police procedures as part of a "Police Officer Safety Action Plan." The evidence revealed that between 1993 and 2003, law enforcement agencies had become increasingly aware of high-speed rear-end collisions in which police officers were injured or killed due to postcrash fires in Crown Victoria Police Interceptors while performing police duties.

¶ 125 As a result of the panel's findings, Ford developed recommendations for improved police safety procedures, including the "Trunk Packing Considerations for Police Vehicles," which advised officers how to place items in the trunk to reduce the potential for trunk contents puncturing the fuel tank, and developed the optional "Interceptor Trunk Pack," consisting of a drop-in trunk liner, requiring the police to place objects in the trunk laterally rather than longitudinally. The sticker on the Trunk Pack indicated "align hard or sharp police equipment laterally." Ford also developed a website containing information regarding the upgrades to the Police Interceptor and notified fleet customers of the Trunk Pack. However, civilian

owners of Panther platform vehicles, including the Jablonskis, never received notice of the availability of these upgrades.

¶ 126 Based upon the evidence at trial, the extent of Ford's undertaking in developing the Trunk Pack and Trunk Packing Considerations was directed specifically at improved police safety related to use of the Police Interceptor. The Trunk Pack was developed for the Police Interceptor by Ford with input from law enforcement to address specific police concerns and that was the impetus for its development, along with the packing considerations for police vehicles. That undertaking did not create a duty owed toward other individual civilian customers. Furthermore, at no time in any of plaintiffs' six iterations of its complaint did they ever contend that Ford undertook a voluntary duty with respect to any nonpolice customers. Consequently, contrary to the appellate court's finding, the trial court erred in instructing the jury on a postsale duty to warn theory based on a voluntary undertaking.

¶ 127 V. Other Contentions Raised by Ford

¶ 128 In light of our holding, we need not address Ford's multiple remaining contentions regarding whether there was sufficient evidence of misconduct to warrant submission of plaintiffs' claim for punitive damages to the jury, and its contentions regarding various evidentiary rulings, including whether the trial court erred in admitting evidence related to postsale remedial measures, whether the 416 other accidents were substantially similar, and whether the court erred in rejecting Ford's special interrogatories.

¶ 129 CONCLUSION

¶ 130 In sum, we hold that the duty analysis in a negligent-product-design case encompasses a risk-utility balancing test, and compliance with industry standards is a relevant factor in that analysis, but is not dispositive. Furthermore, in this case, plaintiffs presented insufficient evidence from which a jury could conclude that Ford breached its duty of reasonable care on the first three negligent-design theories. Plaintiffs' fourth theory, premised on a postsale duty to warn, was not cognizable under Illinois law and its voluntary undertaking did not create a duty to civilian customers. For the foregoing reasons, we reverse the judgments below.

¶ 131 Judgments reversed.