

## **Rebuttable Presumption affirmed**

by Robert B. Thornburg

On December 5, 2006, the Indiana Supreme Court announced its unanimous decision in Schultz v. Ford Motor Company, 857 N.E.2d 977 (Ind. 2006) holding that it was appropriate for Indiana trial courts to instruct Indiana juries on Indiana's "rebuttable presumption" in favor of product manufacturers. Specifically, Ind. Code § 34-20-5-1 creates a rebuttable presumption that a manufacturer has exercised reasonable care and the manufacturer's product is free of defects if the product was in conformity with the existing state of the art or complied with applicable codes, standards, regulations or specifications of the United States or Indiana when the product was designed, manufactured, packaged and labeled. The statutory presumption created by the General Assembly is currently the subject of Indiana Civil Pattern Jury Instruction 7.05(D). Prior to the Supreme Court's decision, however, not all commentators agreed that the Instruction should be given. Thus, to understand the Supreme Court's decision and its significance to Indiana jurisprudence, a brief review of the facts of the case and the divided authority on whether the presumption was the proper subject of an instruction is in order.

In December 1997, Richard Schultz lost control of his 1995 Ford Explorer when it hit a patch of black ice on Indiana State Road 2 in northwestern Indiana. The Explorer slid off the road into a ditch, hit a sloped embankment, and rolled over. During the rollover, Schultz suffered a broken neck, rendering him a quadriplegic. Schultz and his wife, Gail, sued Ford Motor Company alleging the Explorer's roof was defectively designed.

When the Schultz case was tried, the Indiana Judges Association had drafted Indiana Civil Pattern Jury Instruction 7.05(D) to account for the presumption in Indiana Code § 34-20-5-1. When the Civil Instructions Committee met and drafted the 1998 supplement to the 1989 Indiana Civil Pattern Jury Instructions, it drafted instructions to account for many of the changes to Indiana law caused by 1995 Tort Reform. Joseph R. Alberts and Knight S. Anderson, *Thoughts on Jury Instructions in Product Liability Cases*, The Indiana Lawyer, August 30, 2000, pg. 23. Initially, the Committee drafted Instruction No. 7.05(B) which contained the "state of the art" and "compliance with code" instruction created by Ind. Code § 34-20-5-1. Despite drafting and including a pattern instruction modeled on Ind. Code § 34-20-5-1, the Committee recommended that its proposed instruction not be given. *Id.* Through revisions by the Committee, however, former Pattern Instruction No. 7.05(B) was renumbered as Civil Pattern Instruction No. 7.05(D). And, the 1998 Committee recommendation suggesting the instruction not be given was removed.

Scholarly commentary on the propriety of an instruction based on Ind. Code § 34-20-5-1 was not unanimous. For example, Judge Robert Miller and Professor Ivan Bodensteiner opined that Indiana Evidence Rule 301 required a trial court to instruct a jury on the presumption and recommended giving an instruction. *See* Ivan E. Bodensteiner, *Indiana Rules of Evidence*, 27 Ind. L. Rev. 1033, 1063 (1994); Robert L. Miller, 12 *Indiana Evidence* Rule 301, pp. 178-79

(1995). Indiana University-Bloomington law professor J. Alexander Tanford, however, took the contrary view. He opined that the presumption helped the defendant on summary judgment but was of "no importance at trial" because the plaintiff would already have rebutted it before the defendant began presentation of its evidence. Therefore, he posited that the presumption had no practical effect. *See* J. Alexander Tanford, *Indiana Trial Evidence Manual* (4th Ed. 1998) and (5th Ed. 2003).

Against this backdrop, upon Ford's request, and over the Schultzes' objections, the trial court instructed the jury on the rebuttable presumption. Following 8 weeks of evidence, the jury returned a verdict for Ford.

The single allegation of error raised on appeal challenged the propriety of Civil Pattern Jury Instruction 7.05(D), based upon Ind. Code § 34-20-5-1, given with slight modifications by the trial court. Mr. and Mrs. Schultz made two arguments on appeal. First, they argued that Indiana continued to subscribe to the "bursting bubble" theory of presumptions. Consequently, once they introduced any evidence of Ford's negligence or any evidence of a defect, the rebuttable presumption, being rebutted, evaporates, serves no further role in the trial, and is not an appropriate subject for a jury instruction. Second, the Schultzes noted that the National Traffic and Motor Vehicle Safety Act's ("Federal Safety Act") saving clause provides that "compliance with a motor vehicle safety standard...does not exempt a person from liability at common law." They argued that Indiana's rebuttable presumption was preempted because it effectively created an affirmative defense based upon compliance with a federal motor vehicle safety standard.

Ford responded that Indiana had abandoned the "bursting bubble" theory of presumptions when the Indiana Rules of Evidence were codified in 1994. Specifically, Indiana Rule of Evidence 301, governing presumptions, now required that "[a] presumption shall have continuing effect even though contrary evidence is received." In a jury trial, Ford argued this mandate could only be met if the jury was instructed that common law or statutory law recognized a particular presumption. Ford also argued that federal preemption was not implicated because the Federal Safety Act's saving clause only reflected Congress's intent that it did not mean to create a federal defense based upon compliance with a federal motor vehicle safety standard, but did not prescribe a state from subscribing a particular value or effect to compliance, as a matter of state law.

In 2005, the Indiana Court of Appeals ruled in the Schultzes' favor and ordered a new trial. The Court of Appeals held that when an opponent of the presumption has met the burden of production, the purpose of the presumption has been fulfilled and the presumption should be dropped from the case. "The rebuttable presumption of IC 34-20-5-1 is not evidence; instead, it should be used as guidance for the court and not as evidence for the jury." Schultz v. Ford Motor Company, 822 N.E.2d 645 (Ind. Ct. App. 2005). With the reversal, the Court of Appeals did not address the federal preemption issue.

Ford sought transfer to the Indiana Supreme Court. And, on August 25, 2005, the Indiana Supreme Court accepted transfer of the appeal, vacating the Court of Appeals' opinion. Once accepted to the Indiana Supreme Court's docket, the appeal garnered widespread interest from amici curiae. The Defense Trial Counsel of Indiana, the Indiana Manufacturers

Association, the Alliance of Automobile Manufacturers, Inc., and the Product Liability Advisory Council, Inc. filed amicus briefs aligned with Ford. The Indiana Trial Lawyers Association and Professor J. Alexander Tanford filed amicus briefs aligned with the Schultzes.

On December 5, 2006, the Indiana Supreme Court, in a unanimous decision, reinstated the jury's verdict for Ford, finding the trial court had properly instructed the jury on the rebuttable presumption arising from Ford's compliance with federal motor vehicle safety standards.

Following an exposition of the "bursting bubble" theory and its history in Indiana law, the Court held: "Rule 301 clearly rejected a pure Thayer 'bursting bubble' approach and changed prior Indiana law when we added the new second sentence: 'A presumption shall have continuing effect even though contrary evidence is received'...[T]he problem with the Thayer 'bursting bubble' rule is that it can operate to prevent juries from effectuating the policies that gave rise to the presumption. It is to overcome this problem that this Court modified the Thayer rule by adding the new 'continuing effect' language when we adopted Indiana Evidence Rule 301." *Schultz*, 857 N.E.2d at 983-84.

The Court was now required to address the Schultzes' contention that the Federal Safety Act preempted a jury instruction advising of a rebuttable presumption from the manufacturer's compliance with federal motor vehicle safety standards. It did so by adopting Ford's analysis:

When it enacted the [Federal] Safety Act and envisioned future federal motor vehicle safety standards, Congress made clear that it was not creating a federal defense to state common law tort actions. Congress did not want its actions—the creation of a federal regulatory body and federal safety standards—viewed as altering existing common law rules. The saving clause, thus, saves those common law actions from the potential preemptive effect of the [Federal] Safety Act's preemption clause: "Without the saving clause, a broad reading of the express preemption provision arguably might preempt those actions, for ... it is possible to read the preemption provision, standing alone, as applying to standards imposed in common law tort actions, as well as standards contained in state legislation or regulation." But, the saving clause does not go further; it does not express any congressional intent to restrict a state legislature or state court from prescribing a particular effect or value to compliance with federal motor vehicle safety standards.

In our federal system, the States are independent sovereigns with "historic primacy" in "regulation of matters of health and safety." In such a system, the federal congress's expression that its action should not be interpreted as affording a particular outcome is a distinctly different inquiry from whether Congress intends to prohibit the states' governments from taking the same or similar action. Specifically, Congress's expression that its provision for

federal motor vehicle safety standards did not create a federal defense to state common law tort actions is a fundamentally distinct notion from whether Congress also sought to prohibit state legislatures or courts from altering their common law to reflect that compliance with federal safety standards was a defense, or of some other value, as a matter of state law. The Safety Act's saving clause expresses no opinion on what effect, if any, a state may choose or not choose to ascribe, as a matter of state law, to a manufacturer's compliance with federal motor vehicle safety standards. While the saving clause is a clear expression that Congress did not intend to create a federal defense, it does not restrict a state sovereign from altering its common law to place some particular value upon compliance with federal safety standards.

*Schultz*, 857 N.E.2d at 987-88 (quoting Appellee's Br. at 27-28) (internal citations omitted). With no federal preemption concerns, the jury's verdict was reinstated.

Of particular interest for trial courts and practitioners alike was the Court's analysis of the language used in the pattern instruction and whether a true presumption is the proper subject of a jury instruction. The instruction given by the Schultz trial court contained the word "presume" and "presumption". The Court noted that the use of the words "presume" and "presumption" in the instruction were done without legal or technical significance. Therefore, their use was not reversible error because, the Court reasoned, a typical juror would interpret these terms as synonymous with infer or assume. Further, the instruction as given, which was closely modeled on the Civil Pattern Instruction 7.05(D), was balanced and fair to both parties. Since legal commentators agree that a jury should not be instructed the law presumes a certain fact, until Civil Pattern Instruction 7.05(D) is revisited by the Civil Instruction Committee, a cautious court or practitioner would be wise to consider substituting the words "infer" or "assume" for presume in Civil Pattern Instruction 7.05(D) or any other non-pattern instruction based thereon. In the end, the opinion is noteworthy because it confirms that Indiana Code § 34-20-5-1 can be the proper subject of an instruction to an Indiana jury in product liability cases.