

Indiana Supreme Court Provides Crucial Guidance on Seat Belt Usage Evidence and The Elements of a Warnings Claim

by Nelson D. Alexander



The Indiana Supreme Court recently affirmed a defense verdict for Ford Motor Company in *Morgen v. Ford Motor Company*, 797 N.E.2d 1146

(Ind. 2003). The opinion is significant because it allowed consideration of evidence of the plaintiff/rear seat passenger's failure to wear his seatbelt, even though it was not required by Indiana statute. The opinion gives valuable guidance on the required elements of warnings claims in Indiana.

On November 14, 1993, Monterey P. Morgen sat in the rear seat of a 1984 Ford Escort Station Wagon, Morgen's girlfriend Kristy Snyder sat in the front passenger-side seat, and her mother Janet Snyder was driving. Morgen was not wearing the seat belt provided in the back seat. The Escort was stopped at an intersection when a Honda Accord rear-ended the Escort at approximately 30 miles per hour. The Escort suffered substantial damage. Morgen sustained a debilitating spinal cord injury.

Morgen filed a products liability suit against Ford claiming that the Escort was defective and unreasonably dangerous. The two parties offered conflicting expert testimony to explain how Morgen was injured. Morgen's experts testified buckling in

the Escort's floor pan launched Morgen into the vehicle's roof. Ford's experts testified that Morgen's neck was broken because the horizontal forces moving the vehicle launched him into the roof of the Escort. Ford introduced rear-end crash tests showing that an unbelted back seat passenger's head does not move appreciably in a vertical direction in rear end accidents. Rather, when the Escort was rear-ended, the car moved forward but Morgen did not. Morgen's torso remained in place as the seatback compressed and moved to a reclined position. The seatback then pushed him forward and as his torso was driven forward, his head and neck, which were above the seat, flexed backward. Ford claimed that Morgen's spinal injury occurred when he ramped up and over the seatback as the Escort moved forward. Ford argued that Morgen's decision not to wear a seat belt contributed to his injuries and constituted a misuse of the Escort within the meaning of Indiana's Product Liability Act.

Over Morgen's objection, the trial court read the following instruction on misuse to the jury: "It is a defense that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party." This instruction closely followed the language of Indiana's statutory misuse defense.

The Court of Appeals determined that the trial court committed reversible error by giving this instruction. The court said that it had "repeatedly held that it is 'clearly foreseeable' that a passenger might fail to wear a safety belt," and that Indiana

law does not require back seat passengers in automobiles to wear one. Given that failure to wear a seat belt was reasonably expected and that there was no clearly enumerated duty to do otherwise, the Court of Appeals concluded that, as a matter of law, failure to wear a seat belt could not constitute a misuse. It vacated the jury's verdict and ordered a new trial.

Vacating the Court of Appeals opinion, the Indiana Supreme Court concluded otherwise: "We believe the instruction was properly given here. We see the essential question to be whether it was within the province of the fact finder to determine if the plaintiff's failure to utilize a safety device provided by the manufacturer constituted misuse of the manufacturer's product. While we agree with Morgen that his failure to use the seat belt did not constitute a misuse as a matter of law, so too do we agree with Ford that the question of misuse was a matter for the jury, not the court, to decide." *Morgen*, 797 N.E.2d at 1149. Acknowledging the importance of legal rules that promote sound public policy, the Court reasoned: "We believe this result serves to encourage manufacturers to equip their products with safety devices irrespective of whether the devices' use is mandatory or even widespread." *Id.*

The Indiana Supreme Court next addressed the trial court's refusal to instruct the jury on Morgen's warnings claim. Morgen's "evidence" supporting his warnings theory was three-fold. First, Ford designed the Escort's floor pan to buckle in the rear end collisions to obtain certain energy management characteristics but did not tell consumers. Second, Janet Snyder tes-

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When Technology Outpaces Discovery Rules: Can Rule-Making Rescue Businesses from the Oppressive Burdens of E-Discovery?

by Randall R. Riggs &
Andrew J. Mallon



I. Introduction to a New World

Today approximately 93% of all new information generated is in magnetic or optical form. *In re Bristo Meyers-Squibb*, 205 F.R.D. 437, 440 n2 (D.N.J. 2002) (citing Kenneth Withers, *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence*. Address at the National Workshop for Magistrate Judges (July 2001) (based on 1999 statistics) (www.kenwithers.com)). Only 0.01% of new information originates in paper form. Conversely, the amount of new information produced each year could fill 500,000 libraries each the size of the United States Library of Congress or the equivalent of all words ever spoken by human beings in history. <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/>.

Electronic commerce, interactive web sites, digital video, word processing, e-mail, databases, as well as hard drives, servers, CDs, floppies, etc., have permanently changed international business, and legal services throughout the world must match this change. All of this new type of information is discoverable in litigation.

Modern computer technology allows cheap and almost instantaneous communication and automated data storage. Computer usage today is so pervasive that it not only facilitates communication but it actually encourages “stream of consciousness” exchanges. Good for “chat rooms”? Maybe. Good for “court rooms”? Not really. The volume of data created and the burden to search and produce it make the tra-

ditional “paper” model for discovery unwieldy--if not impossible--for electronic based information. This article presents a brief overview of the current sad state of affairs on the e-discovery front and looks at some ongoing efforts to fix it.

II. Electronic Discovery Difficulties

A. Electronically Stored Data and Documents Conform Poorly to Current Discovery Rules

Electronically stored data and documents are far different from paper records. *See generally*, Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to The Task?* 41 B.C.L. Rev. 327, 361-67 (Mar. 2000) (general technical analysis and unique attributes of electronically stored data and documents). Unlike paper letters and memoranda, electronic documents--particularly e-mails--facilitate instant communication between several people at once and, thus, are uniquely conversational. A message or document file may exist in different places at the same time. Additionally databases--and to a lesser extent draft document files--exist in different versions at different times. Specific added information, changes or revisions, the dates and times of those changes, and even the manner of the revisions may be relevant and discoverable.

The technological complexity and volume of information subject to electronic discovery has a direct correlation to the expense of legal e-discovery. Broad, ambiguous discovery requests complicate the process. Additional computer users and hardware to be searched require broader, more complicated search efforts to insure reliability. The absence of electronic document retention policies and the passage of time tend to increase the complexity of any search. Restoration of deleted materials, or the need to search and produce materials from outdated programs, further compli-

cates such projects.

Limitless storage means everything can be saved. It is likely the greatest discovery cost inflator. Post-it notes, margin notes, off-hand comments, sarcasm and humor that otherwise would have been appropriately discarded or spoken and forgotten as a “water cooler” comment are now recorded in e-mails and transmitted throughout a company and even the world.

Electronic commerce, interactive web sites, digital video, word processing, e-mail, databases, hard drives, servers, CDs, floppies, etc., ...all of this information is discoverable in litigation.

Increased information volume equates to increased discovery costs and legal fees to cull through results for non-privileged, responsive data. Increased volume also increases the risk of inadvertent disclosure of privileged, confidential, or personally embarrassing documents. And, increased volume increases the need for discovery consultants and requires the creation and maintenance of document management systems.

Electronic discovery dilemmas abound:

- ❖ What is the company’s duty to preserve or restore deleted electronic documents and data and for how long does that duty continue?
- ❖ Should the company stop recycling emergency restoration back-up systems?
- ❖ What computer systems are to be searched and by whom--the company, the company’s lawyers, an outside vendor, the opposing party, the

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regulatory agency, a court?

- ❖ Are the company’s computers, servers and back-up recovery systems to be seized or otherwise diverted from their everyday functions to conduct these searches? If so, for how long?
- ❖ If the searches uncover confidential, privileged or embarrassing correspondence or information, can the company keep it confidential?
- ❖ Once the searches are finished, in what form should the data be transmitted: paper or electronic?
- ❖ What information about the resulting electronic documents should the company include--creation date, author, edit dates, etc.?
- ❖ Does the company need to restore and include hidden secondary data, drafts of electronic documents, or hidden database fields?
- ❖ Who pays the restoration, search, and production costs?

B. The Potential for Prejudice

Some companies and defense attorneys argue that the requesting parties tailor requests to increase search complexity, volume, and costs in order to disproportionately and unreasonably burden corporate and governmental litigants. Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 Def. Couns. J. 206, 208 (2001). Electronic discovery disproportionately burdens corporations and businesses whose use of technology is far greater and more pervasive than that of just one individual or family. Regardless of the case’s merits, increased costs can be used as leverage in settlement negotiations. Uninformed courts may not recognize the unique problems and costs posed by electronic discovery of corporations and large businesses, thus resulting in unreason-

able expectations and sanctions.

III. Rulemaking Initiatives to the Rescue?

Concern over these dilemmas has grown, and the Discovery Subcommittee (the committee of lawyers, scholars, and judges associated with the U.S. Federal Judicial Council that is charged with evaluating possible changes to the Federal Rules of Civil Procedure concerning discovery) has begun efforts to fully understand the nature and extent of the problems and possible solutions through amendments to the Federal Rules of Civil Procedure. Myles Lynk and Rick Marcus, *Discovery Subcommittee Report on Electronic Discovery Re: Proposal for Effort to Draft Possible Rule Changes to Address the Problems of Electronic Discovery*, 1-2 (Apr. 14, 2003).

In April of 2003, the Discovery Subcommittee resolved to focus on several areas and devise proposed rule language. *Id.* at 10-11. The Subcommittee made no firm commitment to change the federal rules. *Id.* at 22-23. Rather, the Subcommittee intended a good faith, objective attempt to draft workable language addressing several proposed solutions. *Id.* at 11-22. In April 2004, the Subcommittee submitted formal recommendations for rule changes addressing the following issues:

- a. Discussion of electronic discovery issues early in the litigation process through amendments to Fed. R. Civ. Pro. Rule 26(f), Form 35 and Rule 16(b);
- b. Creating a sufficiently inclusive definition of the topic as “electronically stored information” through amendment to Fed. R. Civ. Pro. Rule 34(a);
- c. Option to produce electronically stored information in response to

interrogatories through amendment to Rule 33(d);

- d. Default rule regarding the form of production (electronic form or paper print-out) through amendment to Rule 34(b);
- e. Ensuring the ability to subpoena electronically stored information from third parties through amendment to Rule 45 consistent with other proposed amendments about e-discovery from parties;
- f. Two alternatives for a new Rule 37(f) to provide parties a “safe harbor” from discovery sanctions that could result from routine recycling of electronically stored information on back-up tapes and systems, or otherwise “lost” electronically stored information;

Myles V. Lynk and Prof. Rick Marcus, *Subcommittee Report Memorandum to*

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About the Authors

Randall R. Riggs devotes his practice to the defense of juvenile products and vehicle/equipment manufacturers and distributors headquartered in the United States and internationally. Mr. Riggs is listed in the *International Who’s Who of Product Liability Defense Lawyers* and the *Outstanding Lawyers of America*. In 2003, he was the recipient of the Defense Research Institute’s Rich Krochock Award.

Andrew J. Mallon concentrates his practice in products liability and general litigation. He co-authored “Defending an Expert Attack Under Rule 702,” Michigan Defense Trial Counsel and “Your Duty to Produce Documents Prior to Deposition,” International Association of Defense Counsel (IADC) Newsletter.

Products Liability Attorneys in the News

Randall R. Riggs was a speaker at the 2004 Joint International Conference in Barcelona, Spain on May 10 and 11. The Conference was a combined effort of the Defense Research Institute, the International Association of Defense Counsel, the Association of Defense Trial Attorneys and the Federation of Defense and Corporate Counsel. Mr. Riggs' presentation, entitled "When Technology Outpaces Discovery Rules ... Can Rule-Making Rescue Businesses from the Oppressive Burdens of E-Discovery?," focused on proposed changes to the Federal Rules of Civil Procedure to better accommodate electronic discovery. For further information, please feel free to contact Mr. Riggs at rriggs@locke.com. A shortened version of the article can be found on page 2. The full version is available at www.locke.com.

Michael A. Bergin recently spoke at the Defense Research Institute seminar entitled "Silica Medicine - The Gold Standard of Toxic Agent Seminars" on June 10 and 11 in Atlanta. Mr. Bergin's presentation was entitled: "Putting the Empty Chair in Play: Proving Shares and Product ID." For the full version of the presentation, please visit the media section of www.locke.com.

Lloyd H. Milliken, Jr. spoke at the Defense Research Institute Damages Seminar in Las Vegas on March 18. The topic was "The Effect of the Liability Situation on What Should be Said about Damages in Opening Statement."

Robert B. Thornburg was recently appointed Court Liaison of the Defense Trial Counsel of Indiana's Product Liability Section. Mr. Thornburg is also currently the editor for the Section's quarterly newsletter. ♦

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Advisory Committee on Civil Rules, RE: E-Discovery Proposals for Discussion at April 2004 Meeting (April 5, 2004).

However, the Subcommittee did not reach a consensus regarding the producing party's burden to produce deleted electronic information and/or data that is not routinely accessed or that is difficult to access by the producing party. Accordingly, the Subcommittee did not formally recommend a rule change to address the issue, even though this is a huge cost multiplier for corporate defendants involved in litigation. Instead, the Subcommittee left the issue open to be determined by the Civil Rules Advisory Committee.

There is a significant need for advocacy to the Federal Judicial Council Advisory Committee on Civil Rules to choose one of the essentially "tabled" proposals submitted by Discovery Subcommittee on this issue. It would be unfortunate if the plaintiffs' bar wins the advocacy battle on this issue without a significant response.

IV. Conclusion

While the fate of electronic discovery rulemaking remains uncertain, problems and questions will persist until bench and bar fully appreciate electronic discovery issues and can settle on reasonable expectations for electronic discovery procedures. Parties should share the tremendous burdens and costs of sharing electronically stored data. Rulemaking seems like the obvious means to reach a consensus. However, new rules also risk creating new problems in an already confusing area of law. The Federal Rules will continue to favor liberal disclosure of information in litigation. Courts and other authorities, however, must wholly appreciate that disclosure and transparency of electronically stored information come at tremendous, and sometimes intentionally prejudicial, costs to businesses. With luck, the proposed rulemaking efforts will help to establish such an appreciation as a universal norm for evaluating the collection and exchange of electronically stored information. ♦

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tified at trial that she "would not have purchased the car," and "wouldn't have let [Morgen] be in the back seat," had she been warned that danger to back seat passengers was a possibility. Finally, Morgen testified that he would not have gotten in the Escort had he known of the alleged potential danger. But, there was no testimony or evidence presented at trial on the content or placement of a warning that would have prevented the danger posed by the alleged defect. The Court found Morgen's "evidence" fell far short of what is required to submit a warnings claim to the jury: "supporting and opposing evidence relevant to a determination of what a proper warning should state . . . [is] indispensable to a rational conclusion that the product was defective and unreasonably dangerous to the user without warnings, and to a rational conclusion that such unreasonably dangerous condition was the proximate cause of the accident and injury." *Morgen*, 797 N.E.2d at 1152. Without such evidence, the parties, the jury, and appellate courts are required to impermissibly speculate as to specific warnings that would have made the product reasonably safe. *Id.*

The Indiana Supreme Court has taken a common sense approach to both evidence of seat belt usage and the proof necessary to state a warnings claim. Both rulings should assist product manufacturers in the future. ♦

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Mr. Alexander has authored several amicus curiae briefs in the product liability arena, including an amicus curiae brief for the Defense Research Institute in *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999), addressing the reliability of expert testimony.

Indiana's Rebuttable Presumption in Product Liability Jury Trials

by Kevin C. Schiferl &
Robert B. Thornburg



It has been nearly ten years since the Indiana General Assembly passed House Enrolled Act 1741, which proponents called the Personal Responsibility Act of 1995. Along with several other changes, the state of the art defense previously codified as Ind. Code § 33-1-1.5-4(b)(4) was changed to create a rebuttable presumption that a product which was manufactured in conformity with the existing state of the art or that complied with applicable codes, standards, regulations or specifications of the United States or Indiana was not defective and the manufacturer of the product was not negligent. I.C. § 34-20-5-1.

Since the rebuttable presumption became effective, *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) and *Cansler v. Mills*, 765 N.E.2d 698 (Ind. Ct. App. 2002) have been decided. Reading these cases literally suggests that the presumption may have no place in a jury trial as both courts reasoned that once evidence tending to rebut the presumption was offered, then the presumption has no "continuing" effect. Neither decision, however, answers the question of whether the rebuttable presumption is the proper subject of a jury instruction because neither court considered Indiana Evidence Rule 301. To give effect to I.R.E. 301, the rebuttable presumption contained in I.C. § 34-20-5-1 must have continuing effect and be the proper subject of a jury instruction, even when contrary evidence is introduced. As such, a rebuttable presumption instruction should be given in appropriate cases.

Indiana's Rules of Evidence as adopted by the Indiana Supreme Court became effective on January 1, 1994. Ivan E. Bodensteiner, *Indiana Rules of Evidence*, 27 Ind. L. Rev. 1033, 1063 (1994). As adopted by the Indiana Supreme Court, Rule 301 provides as follows:

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

The first sentence of I.R.E. 301 mirrors the federal rule and is consistent with Indiana law predating the codification of the Rules of Evidence. With the second sentence, however, the Supreme Court changed Indiana law because it provided that a presumption shall have continuing effect even after contrary evidence is introduced. This second sentence produces a result different than Federal Rule of Evidence 301. Robert Miller, 12 *Indiana Evidence* Rule 301, pp. 178-79 (1995); *Indiana Rules of Evidence*, 27 Ind. L. Rev. at 1069.

Historically, the use of the word "presumption" in Indiana covered a wide range of concepts and procedures including both inferences and presumptions. 12 *Indiana Evidence* § 301.101, pp. 180-81. The second sentence of I.R.E. 301 indicates Indiana's rejection of what is known as the "bursting bubble" theory of presumptions. Under the bursting bubble theory, once evidence to the contrary is

offered, the presumption vanishes from the case and it has no further effect. *Id.* at § 301.102, p. 186. Judge Miller and Professor Bodensteiner, however, posit that I.R.E. 301 requires a different result and both recommend a civil jury be instructed regarding the presumption of no negligence and no product defect.

In *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) and *Cansler v. Mills*, 765 N.E.2d 698 (Ind. Ct. App. 2002), both courts reasoned that in the context of summary judgment, sufficient evidence had been introduced to rebut the presumption in I.C. § 34-20-5-1 (i.e., was there a question of fact as to whether the product complied with the state of the art or governmental regulations). The *McClain* and *Cansler* Courts held there were questions of fact preventing summary judgment because each plaintiff had designated sufficient evidence to create an inference or a factual dispute as to whether the product was compliant or defective.

To reach the "vanishing" presumption result, *McClain* relied on *Sumpter v. State*, 306 N.E.2d 95 (Ind. 1974), reasoning that the presumption was not evidence and should not be treated as such. And, once the burden of persuasion had been satisfied, the presumption "is of no further effect and drops from the case." *McClain*, 759 N.E.2d at 1101. Thereafter *Cansler* built on this passage from *McClain*. *Sumpter*, however, was decided before the adoption of I.R.E. 301, when Indiana still adhered to the "bursting bubble" theory of presumptions. As such, when considering presumptions, *Sumpter* has been effectively overruled by the Supreme Court with the adoption of I.R.E. 301.

In the context of summary judgment motions seeking to use the rebuttable presumption, *Sumpter* may retain some limited vitality. For example, a court could determine that sufficient evidence has

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been offered to rebut or create a question of fact as to whether the presumption has been rebutted and decide that the presumption has no continuing effect. This result, however, should not carry forward to the trial unless the defendant produces insufficient evidence of the issue at trial entitling the plaintiff to a directed verdict. Neither *McClain* nor *Cansler* mentioned, let alone substantively discussed, the effect of I.R.E. 301. Because neither addressed whether a jury should be instructed on Indiana's rebuttable presumption, they are not persuasive authority in the jury trial context.

The most telling indication that the instruction should be given is the history of Indiana's Rebuttable Presumption Pattern Instruction. When the Civil Instructions Committee of the Indiana Judges Association 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. Knight Anderson and Joseph Alberts, "Thoughts on Jury Instructions in Product Liability Cases," *The Indiana Lawyer*, August 30, 2000, pg. 23. The Committee drafted an instruction which contained the state of the art and compliance with standards instruction mandated by I.C. § 34-20-5-1. In the initial draft, however, the Committee recommended that the instruction not be given. *Id.*

Through revisions by the Committee, the rebuttable presumption instruction has been renumbered. Importantly, the 1998 Comment recommending the instruction not be given has been removed. In its place is a reference to I.R.E. 301 and a discussion of presumptions. The Committee has considered and rejected the "bursting bubble" theory of presumptions in light of I.R.E. 301 and the Indiana Supreme Court's mandate that presumptions shall have continuing effect at trial. Hence, even when plaintiffs can and

do produce evidence arguably rebutting the presumption, I.R.E. 301 prevents the presumption from completely disappearing. ♦

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Kevin C. Schiferl is a trial attorney, concentrating his practice in product liability and tort litigation, defending corporations and individuals in personal injury claims involving automobiles and other consumer products. He is also engaged in the defense of professional liability claims. Mr. Schiferl was the youngest of the "Indiana Super Lawyers" named in 2004 by peer-selection from Indiana's attorneys.

Robert B. Thornburg defends automobile and other consumer products' manufacturers, distributors and retailers in product liability claims. He has tried and assisted with numerous jury trials, including product liability, breach of warranty, lemon law, premises liability and automobile negligence cases.

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