

Product Liability

By: James W. Ozog*
Wiedner & McAuliffe, Ltd.
Chicago

Illinois Supreme Court Rejects “Simple Product” Test: *Calles v. Scripto-Tokai Corp.*

In *Calles v. Scripto Tokai Corp.*, No. 101089, 2007 WL 495315 (2007), the Illinois Supreme Court rejected adoption of a *per se* rule that would exempt simple products with open and obvious dangers from analysis under the risk-utility test. Pursuant to the risk-utility test, a plaintiff must prove that the product’s design proximately caused his injury and that the defendant cannot prove that the design’s benefits outweigh its inherent danger. In *Calles*, the defendant, Scripto, argued that its product, a utility lighter, should be exempt from application of the risk-utility test given its simplicity and the obvious dangers associated with it. The Illinois Supreme Court rejected this argument and found that the open and obvious danger of a product does not preclude application of the risk utility test. Rather, the court reasoned that a danger’s open and obvious nature is just one factor that may be considered when applying the risk utility test.

In *Calles*, the plaintiff, Susan Calles, individually and on behalf of her child’s estate, brought strict liability and negligence claims against the designer/manufacture and distributor (collectively “Scripto”) of a utility lighter, the Aim N Flame. Soon after the plaintiff purchased the Aim N Flame, one of the plaintiff’s three-year-old twins, Jenna, started a fire in the family home with the utility lighter. As a result of the fire, the plaintiff’s other three-year-old daughter, Jillian, died of smoke inhalation. The plaintiff alleged that the Aim N Flame was defectively designed and unreasonably dangerous because it did not contain a child-resistant safety device. In addition, the plaintiff claimed that Scripto failed to provide adequate warnings.

In response to the plaintiff’s allegations, Scripto moved for summary judgment. Following the Fourth District’s reasoning in *Scoby v. Vulcan-Hart Corp.*, 211 Ill. App. 2nd 106, 569 N.E.2d 1147 (4th Dist. 1991). Scripto argued that when a product is “simple,” like the Aim N Flame, with open and obvious dangers, a designer/manufacture and distributor cannot be held liable for defective design pursuant to the risk-utility test. Scripto argued that because it had satisfied the consumer-expectation test, the other standard for determining liability due to defective design, it was entitled to summary judgment.

Pursuant to the Illinois Supreme Court’s decision in *Lamkin v. Towner*, 138 Ill. 2d 510, 529, 563 N.E.2d 449, 458 (1990), a plaintiff can establish a cause of action for strict products liability based on a defective design 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.

IDC Quarterly Volume 17 Number 2

© 2007 Illinois Association of Defense Trial Counsel Illinois Association of Defense Trial Counsel,
PO Box 3144, Springfield, IL 62708-3144
217-585-0991; Fax: 217-585-0886, Email: idcoffice@insightbb.com

These standards are known as the consumer-expectation and risk-utility tests, respectively. Typically, the risk-utility test is a much easier standard for a plaintiff to prove and thus, the defendant to overcome. In fact, the Illinois Supreme Court in *Calles*, found that “no fact finder could conclude that the Aim N Flame was unreasonably dangerous under the consumer-expectation test.” Therefore, Scripto’s ability to avoid application of the risk-utility test pursuant to the “simple product” exception first articulated in *Scoby v. Vulcan-Hart Corp.*, was crucial to its chances of prevailing on its motion for summary judgment.

In *Scoby*, a restaurant worker sustained injuries when he fell and his arm became submerged in hot oil contained in an open deep fat fryer. The restaurant worker sued the fryer manufacturer, alleging a design defect and argued for liability under the risk utility test. The defendant manufacturer moved for summary judgment on the ground that the danger presented by an open fryer was not “excessive” and therefore, the risk utility test should not be applied. The Fourth District agreed with the defendant and concluded:

We do not deem that *Lamkin* or other cases applying aspects of the danger-utility test intend that all manufacturers of products described above should be subject to liability depending upon a trier of fact’s balancing under that test...Somewhere, a line must be drawn beyond which the danger-utility test cannot be applied. Considering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, we concluded the circuit court properly applied only the consumer-user contemplation test.

Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3d 106, 112, 569 N.E.2d 1147, 1151 (4th Dist. 1991). The Seventh Circuit, in a case factually identical to *Calles*, adopted the *Scoby* court’s reasoning and found that a Bic lighter was a simple product and, for that reason, the risk-utility test was not applicable. *Todd v. Societe Bic, S.A.*, 21 F.3d 1402 (7th Cir. 1994). Following the logic articulated in both *Scoby* and *Todd*, Scripto argued that “when a product is deemed ‘simple,’ the risk-utility tests need not be employed.” *Calles*, 2007 WL 495315, at *5.

The Illinois Supreme Court rejected Scripto’s argument and found that “upon a close examination of *Scoby*...*Scoby*’s adoption of a ‘simple product’ exception is nothing more than the adoption of a general rule that a manufacturer will not be liable for open and obvious dangers.” *Calles*, 2007 WL 495315, at *7. The Illinois Supreme Court reasoned that a majority of courts have rejected the idea that the open and obvious danger of a product is an absolute defense to a defective design claim. For example, in *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 103, 828 N.E.2d 1128, 1145 (2005), the Court held that the “open and obvious nature of the risk is just one factor to be considered in the range of considerations by the risk-utility test, and it will only serve to bar the liability of the manufacturer where it outweighs all other facts to be considered.” *Calles*, 2007 WL 495315, at *7, citing *Blue v. Environmental Eng’g, Inc.*, 215 Ill. 2d at 103, 828 N.E.2d at 1145.

In addition, the Illinois Supreme Court cited a number of policy reasons that support “rejection of a *per se* rule excepting simple products with open and obvious dangers from analysis under the risk-utility test.” *Calles*, 2007 WL 49315, at *8. For example, “[a]doption of such a rule would essentially absolve manufacturers from liability in certain situations even though there may be a reasonable and feasible alternative design available that would make a product safer.” *Id.* In addition, the court found that a “*per se* rule would frustrate the policy of preventing future harm which is at the heart of strict liability law.” *Id.*

Based on this reasoning, the Illinois Supreme Court held “that the open and obvious danger of a product does not create a *per se* bar to a manufacturer’s liability, nor does it preclude application of

**IDC Quarterly
Volume 17 Number 2**

the risk-utility test.” *Id.* Instead, a danger’s open and obvious nature is one factor that may be weighed in the risk utility test. *Id.*

The Illinois Supreme Court’s decision in *Calles* clarifies the standard to apply in strict products liability cases based on defective design. As first outlined in *Lamkin v. Towner*, 138 Ill. 2d at 529, 563 N.E.2d at 458, a plaintiff can establish a cause of action for strict products liability based on a defective design by satisfying either the consumer-expectation or risk-utility tests. The *Calles* decision establishes that these tests have no exceptions regardless of the simplicity of the product involved. In addition, it confirms that the open and obvious nature of a danger is only one factor to consider when applying the risk-utility test and that in no instance, should it be regarded as an absolute defense.

ABOUT THE AUTHOR

James W. Ozog is a partner in the Chicago firm of *Wiedner & McAuliffe, Ltd.* He received his undergraduate degree from Northwestern University and law degree from Washington University in 1977. Mr. Ozog concentrates his practice in product liability defense matters and commercial litigation. In addition to his Illinois defense practice, he is National Trial Counsel for several product manufacturers. He has appeared as lead defense counsel in over twenty states and tried cases to verdict in seven states besides Illinois. He also represents clients on a regular basis in matters before the United States Consumer Products Safety Commission. He is a member of the American Bar Association, DRI, IDC and the Propane Gas Defense Association.

IDC Quarterly
Volume 17 Number 2

© 2007 Illinois Association of Defense Trial Counsel Illinois Association of Defense Trial Counsel,
PO Box 3144, Springfield, IL 62708-3144
217-585-0991; Fax: 217-585-0886, Email: idcoffice@insightbb.com