

NO WARNING . . . SO WHAT?
THE INDIANA SUPREME COURT'S RULING IN *KOVACH V.*
CALIGOR MIDWEST AND PROXIMATE CAUSE GIVEN
THE READ-AND-HEED PRESUMPTION IN
FAILURE-TO-WARN CASES

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The Indiana Supreme Court recently addressed the presumption of causation in the failure-to-warn context in *Kovach v. Caligor Midwest*, involving an allegedly defective medical device.¹ The supreme court expressly held that even with Indiana's presumption that the claimant would have read and heeded an adequate warning, the claimant still bears the burden of proving the danger that would have been prevented by an appropriate warning was actually the cause of claimant's injury.² In doing so, the court determined the issue as a matter of law, even where certain factual issues existed in the record, thereby paving the way for more Indiana courts to follow suit in cases where such a determination is similarly warranted.

This article first briefly discusses Indiana products liability law in failure-to-warn cases. The article next analyzes the recent *Kovach* decision, which highlights a plaintiff's burden of proof in products liability failure-to-warn cases and the circumstances under which the presumption of causation arises and remains in effect.³ Under *Kovach*, the supreme court has made it clear that the read-and-heed presumption is not dispositive; a plaintiff must still prove proximate causation. Although proximate causation is typically a question for the jury, *Kovach* establishes that in appropriate cases, proximate causation may be so obvious or so lacking the court may decide the issue as a matter of law. Third, this article considers the circumstances under which Indiana state courts have determined proximate causation as a matter of law. Finally, for comparison purposes, the

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¹ See *Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009) (Boehm, J.).

² *Id.* at 199.

³ *Id.*

article examines those cases in which Indiana courts have found proximate causation to be a question for the jury.

I. INDIANA'S PRODUCT LIABILITY ACT AND FAILURE-TO-WARN CLAIMS

Indiana's Product Liability Act (the "Act") imposes liability upon sellers of a product in a defective condition unreasonably dangerous to any user or consumer.⁴ The Act governs all actions (1) brought by a user or consumer (2) against a manufacturer or seller (3) for physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought.⁵

In failure-to-warn cases, the Act mandates the use of the negligence standard to analyze potential liability.⁶ A product may be defective under the Act where the manufacturer fails in its duty to warn of a danger or instruct on the proper use of the product when the average consumer is unaware of that danger or use.⁷ This duty is twofold: (1) to provide adequate instructions for the safe use and (2) to provide a warning of dangers inherent in foreseeable improper use.⁸

II. THE PRESUMPTION

In considering failure-to-warn claims, Indiana follows comment J of *Restatement (Second) of Torts* § 402A, which provides a presumption that an adequate warning would be heeded.⁹ This presumption, known as the read-and-heed presumption, allows a claimant to assert that if an adequate warning had been given, the claimant would have read that warning and followed it. The read-and-heed presumption actually "operates to the bene-

⁴ *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1148 (Ind. 2003).

⁵ IND. CODE ANN. § 34-20-1-1; *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 809 (Ind. 2007). Although the Indiana Supreme Court declined to address whether tort-based breach-of-warranty claims have been subsumed in the Act in its *Kovach* opinion, the supreme court nonetheless cited decisions from several federal district courts and other panels of the Indiana Court of Appeals holding that tort-based breach-of-warranty claims have been subsumed into the Products Liability Act. *Kovach*, 913 N.E.2d at 197 (citing *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at *3 (N.D. Ind. Feb. 7, 2006); *New Hampshire Ins. Co. v. Farmer Boy AG, Inc.*, No. IP 98-0031-C-T/G, 2000 WL 33125128, at *3 (S.D. Ind. Dec. 19, 2000); *Condon v. Carl J. Reinke & Sons, Inc.*, 575 N.E.2d 17, 18 (Ind. Ct. App. 1991)).

⁶ IND. CODE ANN. § 34-30-2-2 ("[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.").

⁷ *Id.*; *Rushford*, 868 N.E.2d at 810. See also Indiana Pattern Jury Instruction 7.35(B) ("A manufacturer is liable to a user or consumer of a product if: 1. The danger(s) is/are not open and obvious; and 2. The manufacturer knows or should have known of the danger; and 3. The manufacturer has failed to warn of the danger.").

⁸ *Rushford*, 868 N.E.2d at 810.

⁹ *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979).

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fit of a manufacturer where adequate warnings are given.”¹⁰ This is because users are presumed to have read the warnings provided. If the warnings are adequate, the manufacturer has met its duty to warn.¹¹

III. OVERCOMING THE PRESUMPTION

The read-and-heed presumption is not an abrogation of the issue of causation, subjecting manufacturers to liability for almost any injury caused by their product.¹² As previous Indiana Court of Appeals decisions stated and *Kovach* expressly holds, even if a plaintiff receives the benefit of the read-and-heed presumption, the plaintiff still must prove the inadequate warning was the proximate cause of the injury suffered.¹³ A plaintiff bears this burden because failure-to-warn claims, like all products liability claims, require proof that the injury sustained was proximately caused by the alleged product defect, regardless of whether those claims are brought under strict liability or negligence.¹⁴ The facts of *Kovach* provide a perfect example of the rationale behind this rule. In *Kovach*, a child was prescribed 15 milliliters (mL) of acetaminophen with codeine following a surgery.¹⁵ A nurse administered the medication, a light red liquid, using a translucent plastic medicine cup with a maximum volume of slightly more than 30 mL.¹⁶ The nurse testified she filled the cup about half way, but the child's father testified the nurse gave the child a full cup of medicine.¹⁷ The child was discharged but later died with the autopsy revealing the cause of death to be opiate overdose with more than twice the recommended level of codeine in the child's bloodstream.¹⁸ The child's parents sued the manufacturers and distributor of the medicine cup.¹⁹ The parents argued, among other things, that if the medicine cup had been better suited as a precision measuring device or had contained a warning that it was unsuitable for precision measurement, the child would not have been injured.²⁰

¹⁰ *Id.*

¹¹ “The warning should be of such intensity to cause a reasonable man to exercise for his own safety caution commensurate with the potential danger.’ We must therefore consider the adequacy of the factual context, the adequacy of the manner in which that context is expressed, and the adequacy of the method conveying these expressed facts.” *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1162-64 (Ind. Ct. App. 1988) (quoting *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541 (Ind. Ct. App. 1979), *trans. denied*).

¹² *Ortho Pharm. Corp.*, 388 N.E.2d at 555.

¹³ *See id.* at 556; *Kovach*, 913 N.E.2d at 199.

¹⁴ *Rushford*, 868 N.E.2d at 810.

¹⁵ *Kovach*, 913 N.E.2d at 195.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 195-96.

²⁰ *Id.* at 196.

On the design defect claim, the parents offered expert testimony from a pharmacist and associate professor of pharmacology that the cup's imprecision could result in as much as a twenty- to thirty-percent margin of error in measurement.²¹ The expert witness, therefore, found the cup unsuitable for precision measurement.²² However, the court found the undisputed evidence demonstrated that the overdose amounting to twice the recommended dose was not caused by an imprecise measurement of medication attributable to less-than-readily-discernible marks on the medicine cup.²³ Instead, the court found that "even if we assume the nurse administered the correct 15-mL dosage of codeine, the cup's imprecision would at most result in an overdose of only 30 percent and could not account for the 100 percent excess level of codeine discovered in the autopsy."²⁴ The child had more than *twice* the recommended level of codeine, amounting to much greater than the expert's proffered twenty- to thirty-percent margin of error. Therefore, the court held the accident could not be attributed to any alleged defect in the product itself.²⁵

On the failure-to-warn claim, the parents argued, and the *Kovach* court agreed, that the read-and-heed presumption applied in this case.²⁶ However, the court held that "the read-and-heed presumption does not completely dispose of the causation issue in a failure-to-warn case."²⁷ The court expressly held: "The plaintiff invoking the presumption must still show that the danger that would have been prevented by an appropriate warning was the danger that materialized in the plaintiff's case."²⁸ In other words, the plaintiff must still prove proximate causation.

Two components comprise proximate cause: causation-in-fact and scope of liability.²⁹ To establish factual causation, a plaintiff must show that but for the defendant's allegedly tortious act or omission, the injury at issue

²¹ *Id.* at 198.

²² *Kovach v. Alparma, Inc.*, 890 N.E.2d 55, 64 (Ind. Ct. App. 2008), *rev'd by Kovach*, 913 N.E.2d at 199-200.

²³ *Kovach*, 913 N.E.2d at 198.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 198-99.

²⁷ *Id.* at 199.

²⁸ *Id.* (citing 2 DAN B. DOBBS, *THE LAW OF TORTS* § 367 (2001) ("The plaintiff who is not properly warned that asbestos can cause respiratory disorders must show . . . that she in fact has such a disorder resulting from asbestos exposure . . . [T]he injury suffered must be within the class of injury that the warning requirement was meant to avoid."); 1 DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, *MADDEN & OWEN ON PRODUCTS LIABILITY* § 9:11 (3d ed. 2000) (even where the read-and-heed presumption applies, "pivotal to the successful maintenance of plaintiff's claim of actionable failure to warn is the demonstration that the seller's failure to warn adequately of the hazard was a cause-in-fact and a proximate cause of the injury")).

²⁹ *Id.* at 197.

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would not have occurred.³⁰ The scope of liability doctrine asks whether the injury was a natural and probable consequence of the defendant's conduct, which in light of the circumstances, should have been foreseen or anticipated.³¹ Liability is not imposed on a defendant if the ultimate injury was not reasonably foreseeable as a consequence of the act or omission.³² Causation-in-fact is ordinarily a factual question reserved for determination by the jury.³³ However, where reasonable minds cannot disagree as to causation-in-fact, the issue may become a question of law for the court.³⁴

Applying the read-and-heed presumption, the *Kovach* court assumed the nurse would have read a warning advising the cup was not designed for precision measurement and would have chosen a precision applicator to administer the codeine.³⁵ But using a precision applicator would not have prevented the harm suffered by the child, who received more than twice the recommended level of codeine. To the contrary, the *Kovach* court found that the child's overdose was caused by the accidental *doubling of the dosage* where the nurse knew that 15 mL was the proper dosage and, consequently, the overdose was not caused by an imprecise measurement.³⁶ The *Kovach* court found this to be the case as a matter of law, despite the factual dispute regarding the amount of medicine administered to the child. The *Kovach* court affirmed the trial court's grant of summary judgment in favor of the cup manufacturers.³⁷

³⁰ *Id.* at 197-98.

³¹ *Id.* at 198.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 199.

³⁶ *Id.* at 199. In the Indiana Court of Appeals' *Kovach* opinion, the majority acknowledged the tenet that an absent or inadequate warning must involve the very risk that caused injury to the plaintiff; however, the court nonetheless reached a conclusion contrary to that of the Indiana Supreme Court, finding: "[H]ere the absence of a warning not to use the Cup to dispense precise medicinal dosages to children, involved the very risk—the overdose of . . . Codeine—that caused [the child's] death." *Kovach v. Alpharma, Inc.*, 890 N.E.2d 55, 71 (Ind. Ct. App. 2008), *rev'd by Kovach*, 913 N.E.2d at 199-200. Moreover, the court of appeals went one step further with regard to causation, concluding: "As such, pursuant to this court's case law, we conclude that the missing warning is in essence a presumption of causation." *Id.* *But see id.* at 72-73 (Baker, C.J., dissenting) (finding the child's parents failed to establish that imprecise measuring caused the nurse to administer the overdose to the child; no reasonable fact finder would conclude that the nurse's actions were the result of a *measuring* error; and where, as here, an absent or inadequate warning did not involve the risk that caused injury to the plaintiff, no presumption of causation comes into play).

³⁷ *Id.* at 200. While the Indiana Court of Appeals' rulings in the *Kovach* case involved other issues beyond proximate causation in the failure-to-warn context, which DTCI's amicus curiae brief addressed, those issues lie outside the scope in this article. DTCI's amicus curiae brief can be found at *DTCI Amicus Corner: Kovach v. Caligor Midwest*, VI(1) INDIANA CIVIL LITIGATION REVIEW 135 (2009). *See also* Jon Laramore and Christina L. Clark, *Appellate Civil Case Law Update*, 53(29) RES GESTAE (Dec. 2009) (examining the Indiana Supreme Court's *Kovach* ruling).

IV. PROXIMATE CAUSATION AS A MATTER OF LAW

Kovach establishes that the read-and-heed presumption is not dispositive. A plaintiff must still prove proximate causation. Although proximate causation is typically a question for the jury, where proximate causation may be so obvious or so lacking, the court may decide the issue as a matter of law. The question becomes this: When does causation reach the point where “reasonable minds cannot disagree”?

Indiana case law reveals that Indiana courts find proximate cause lacking as a matter of law where (1) the user of the product was aware of the particular danger of which she claimed the product contained an insufficient warning, (2) an unforeseeable intervening cause constituted the proximate cause, or (3) the plaintiff was so negligent that the defendant’s action or failure to warn could not be the proximate cause of the injury.

A. DANGERS KNOWN TO USER

In some cases, the user already knows the inherent dangers such that a manufacturer or distributor’s warning would not have prevented the user’s injury, as a matter of law.³⁸ For example, in *Shanks v A.F.E. Industries, Inc.*, the defendant manufactured a grain dryer that was sold to the partial owner-manager of a company that bought, processed, and resold grain. This particular grain dryer was configured so that the elevator leg automatically activated when the dryer unloaded the grain.³⁹ An employee-plaintiff at the facility who processed the grain used the grain dryer and was injured when the elevator leg automatically activated.⁴⁰

Employee-plaintiff argued that the lack of warning to the user that the elevator leg would automatically activate during the unload phase rendered the dryer unreasonably dangerous.⁴¹ The court noted that the manager knew about the automatic nature and characteristics of the dryer and had the grain complex built to use that feature, making operations as automatic as possible.⁴² Consequently, the court found the manufacturer satisfied its duty to warn and instruct the ultimate user when it adequately warned and instructed the manager; thereafter, the manager became responsible for passing those warnings along to the employee-plaintiff.⁴³

The court relied upon the fact that the owner-employer designed the entire grain operation, and the dryer constituted merely one component of that operation. The court concluded the manufacturer could not possibly

³⁸ See *Shanks v A.F.E. Indus., Inc.*, 416 N.E.2d 833 (Ind. 1981); *Deaton v. Robison*, 878 N.E.2d 499 (Ind. Ct. App. 2008); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2005).

³⁹ *Shanks*, 416 N.E.2d at 836.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 837.

⁴³ *Id.*

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have known how the dryer was to be used in this system.⁴⁴ The court found no additional warning or literature furnished by the manufacturer at the time of sale would have improved the manager's understanding of the characteristics of the machine.⁴⁵

Since the manager was well versed in the dangers, including this particular danger, and the manager had a duty to pass on those instructions to the ultimate user, the court found that the alleged failure to warn did not proximately cause employee-plaintiff's injuries.⁴⁶ Therefore, the court determined as a matter of law that the manufacturer did not violate its duty to instruct and warn and affirmed the trial court's judgment on the evidence.⁴⁷

In *Deaton v. Robison*, a man inadvertently shot his hunting partner, the plaintiff, while attempting to unload his rifle. This gun was equipped with both a trigger safety and a secondary safety.⁴⁸ Only one safety, the trigger safety, was engaged at the time of the accident.⁴⁹ The plaintiff sued the shooter and the gun manufacturer.⁵⁰ The plaintiff claimed the manufacturer should be held liable because of its failure to warn that the gun could fire with the trigger safety engaged, if the secondary safety were not also engaged.⁵¹ The shooter testified that he was aware of the risk of the gun firing when the secondary safety was not engaged and that he knew it was dangerous to unload the rifle in the way in which he did.⁵² Consequently, the court held as a matter of law that the manufacturer could not be held liable for the failure to warn because the shooter was aware (1) that it was dangerous to unload the rifle in the presence of others and (2) that engaging the secondary safety would have prevented the shooting.⁵³ The court couched this as an issue of whether it was reasonable for the manufacturer to omit the warning about the secondary safety, and it held that it was reasonable. But a reading of the decision reveals that, as a matter of law, the plaintiff was unable to prove that the alleged failure to warn was the proximate cause of his injuries.

In *Coffman v. PSI Energy, Inc.*, an experienced truck driver was injured when he raised the tarp over the truck's trash-filled trailer, causing it to come into contact with the overhead power lines. The driver sued the power line company alleging there was a failure to warn of the uninsulated power

⁴⁴ *Id.* at 838.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Deaton*, 878 N.E.2d at 500.

⁴⁹ *Id.*

⁵⁰ *Id.* at 501.

⁵¹ *Id.*

⁵² *Id.* at 502.

⁵³ *Id.*

line and about the dangers inherent to the use of the trailer and tarp.⁵⁴ But the driver's own testimony demonstrated that he knew about the presence of the power lines at this location; he had driven there approximately twenty-five times in the four or five months before the accident.⁵⁵ His testimony showed that he knew of the risks involving the tarp since he had previously experienced a similar mishap.⁵⁶ The court determined the driver was injured because he was not watching what he was doing, and so no warning could have prevented his injuries.⁵⁷ Thus, the court held the failure to warn was not a proximate cause of his injuries as a matter of law and affirmed summary judgment for the power line company.⁵⁸

In all three of these cases, the user of the product was aware of the very danger that caused the injuries.⁵⁹ Where such facts are established, Indiana courts are willing to find the lack of an adequate warning regarding a particular danger already known to the user is not the proximate cause of the injuries as a matter of law.

B. INTERVENING CAUSES

In other cases, Indiana courts find an intervening cause will break any chain of causation such that the defendant's actions cannot be considered the proximate cause of the injuries.⁶⁰ Although not products liability cases, these decisions provide insight into Indiana courts' inclination to determine proximate cause as a matter of law under the appropriate set of facts.

In *Havert v. Caldwell*, a police officer, Havert, pulled his car to the curb of Taylor Street to investigate a crime.⁶¹ The Hooks stopped their car abruptly behind the police officer's car on Taylor Street and were hit from behind by a third driver, Caldwell. While investigating the accident, the police officer and Mr. Hook walked between the Hooks' and Caldwell's cars to survey the damage. Mrs. Hook stood to the side, also surveying the damage.⁶² At that same time a drunk driver drove her car into the rear of Caldwell's car, pushing it forward into the Hooks' car, which then hit the police officer's car. The Hooks and the police officer were injured. The Hooks sued Caldwell and the drunk driver, and the police officer and his wife, the Haverts, joined as plaintiffs. But Caldwell moved for partial summary

⁵⁴ *Coffman*, 815 N.E.2d at 527.

⁵⁵ *Id.* at 528.

⁵⁶ *Id.*

⁵⁷ *Id.* at 529.

⁵⁸ *Id.*

⁵⁹ In *Shanks*, the user, employee-plaintiff, claimed to be unaware of the danger. However, the manager was aware of the danger and had the duty to pass that information on to employee-plaintiff. *Shanks*, 416 N.E.2d at 837.

⁶⁰ See *Havert v. Caldwell*, 452 N.E.2d 154 (Ind. 1983).

⁶¹ *Id.* at 155.

⁶² *Id.*

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judgment based on the Hooks' own negligence and his contention of an unforeseen intervening act and, therefore, his actions were not the proximate cause of the injuries.⁶³

The court emphasized "where the negligent actor's act or omission has the effect of setting in motion the chain of events leading to the injury, the key to holding that act or omission to be the proximate cause of the injury is that the ultimate injury be one that was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission."⁶⁴ The court found it not reasonably foreseeable that a drunken driver would drive through a lane in which parking was permitted and collide with a parked car.⁶⁵ Therefore, the court held Caldwell's actions were not the proximate cause of the Hooks' injuries as a matter of law.⁶⁶

In addition, Indiana courts find suicide, if voluntary and willful, to be an intervening cause as a matter of law.⁶⁷ In *Hooks SuperX, Inc. v. McLaughlin*, a lumberjack injured his back while working and became addicted to propoxyphene during his recovery.⁶⁸ He was repeatedly prescribed drugs containing propoxyphene and filled most prescriptions at a Hooks drugstore.⁶⁹ He consumed the drugs very quickly, much faster than prescribed.⁷⁰ During that same period, the lumberjack was found holding a shotgun to his head, but he did not pull the trigger.⁷¹ The lumberjack and his wife brought suit against Hooks on the theory that it breached its duty of care by failing to stop filling the prescriptions.⁷² Hooks moved for summary judgment, claiming the lumberjack's consumption of the drugs and suicide attempt constituted an intervening cause of his injuries.⁷³ The court emphasized that an intervening negligent act breaks the chain of causation only if the harm resulting from the intervening act could not have been reasonably foreseen by the original negligent actor.⁷⁴ The court found suicide by a sane person to be sufficient to break the causal connection between the original negligence and the suicide; however, suicide constitutes an intervening cause only if it is the voluntary and willful act of the vic-

⁶³ *Id.* at 156. The court also ultimately held that the Hooks were not negligent for standing between two vehicles in a lane in which parking was legally permitted. *Id.*

⁶⁴ *Id.* at 158.

⁶⁵ *Id.* at 159.

⁶⁶ *Id.*

⁶⁷ See *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514 (Ind. 1994).

⁶⁸ *Id.* at 516.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 520.

tim.⁷⁵ In contrast, the court held that suicide induced by mental illness, which is so severe that one cannot direct one's own conduct, does not constitute an intervening cause.⁷⁶ The court could not say as a matter of law that the trial court was incorrect in concluding the lumberjack's suicide attempt may have been induced by a reaction to his drug addition, a mental illness, and therefore affirmed the trial court's denial of Hooks' motion for summary judgment.⁷⁷ As the *Kovach* court held, a plaintiff must demonstrate that the injury was the natural and probable consequence of the defendant's conduct, which in light of the circumstances, should have been foreseen or anticipated.⁷⁸ *Havert* and *Hooks* demonstrate Indiana courts will find as a matter of law that intervening causes break the chain of causation where the intervening cause was not reasonably foreseeable.

C. PLAINTIFF'S COMPARATIVE FAULT

Indiana courts have found a plaintiff to be so negligent that, as a matter of law, the defendant's action or failure to act could not be the proximate cause of the plaintiff's injury.⁷⁹ In *Lawson v. Public Service Co. of Indiana*,⁸⁰ a man died while he and his neighbor were constructing an addition to the neighbor's home. The deceased was attempting to remove a portion of the roof overhang that supported the house's electrical service equipment when the electrical equipment broke loose and electrocuted him.⁸¹ The plaintiff, administratrix for the deceased, alleged the electric company was negligent, in part, for the failure to warn of the potential hazards of the electrical equipment.⁸² The court held the deceased's negligence constituted an intervening cause that the electric company could not have foreseen.⁸³ The court also held that the deceased's own negligence proximately caused the death.⁸⁴ Therefore, the court affirmed summary judgment, holding as a matter of law that any lack of warning did not proximately cause the death.⁸⁵

⁷⁵ *Id.* at 521.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Kovach*, 913 N.E.2d at 198.

⁷⁹ See *Lawson v. Public Service Co. of Ind.*, 493 N.E.2d 815 (Ind. Ct. App. 1986); *Funston v. School Town of Munster*, 849 N.E.2d 595 (Ind. 2006); *Hapner v. State of Indiana*, 699 N.E.2d 1200 (Ind. Ct. App. 1998).

⁸⁰ 493 N.E.2d 815 (Ind. Ct. App. 1986).

⁸¹ *Lawson*, 493 N.E.2d at 815-16.

⁸² *Id.* at 817.

⁸³ *Id.* at 818.

⁸⁴ *Id.* at 818-19.

⁸⁵ *Id.* at 819.

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In *Funston v. School Town of Munster*, a man claimed injuries as a result of falling off the back row of bleachers.⁸⁶ The man and his wife brought suit against, among others, the school that supplied the bleachers. The school moved for summary judgment, asserting the man was contributorily negligent as a matter of law.⁸⁷ The man argued the school failed to establish as a matter of law that any alleged negligence on his part proximately caused his resulting injuries.⁸⁸

The record undisputedly established the man leaned backwards before checking if anything existed for him to lean against.⁸⁹ The court held that falling backwards and suffering injuries should have been reasonably foreseen as a natural and probable consequence of failing to look first.⁹⁰ Therefore, the court held that the man was negligent as a matter of law and that his negligence was a proximate cause of his claimed injuries.⁹¹

Hapner v. State of Indiana, arose out of a motor vehicle accident in which a driver struck two horizontal rails of a guardrail that contained no protective end covering.⁹² The State of Indiana and the Indiana Department of Transportation, two of the defendants in this case, moved for judgment on the pleadings, claiming the driver's contributory negligence acted as a complete bar to his suit against them.⁹³ The court found that in order for any negligence of the driver to bar his suit, that negligence must be the proximate cause, not a remote cause, of his injuries.⁹⁴

The court concluded that the driver diverted his attention from the road and held: "it is reasonably foreseeable that a person who diverts his attention from the road while driving and veers into the median will strike objects located in that median."⁹⁵ Given these facts, the court held that the driver's negligence was the proximate cause of his injuries as a matter of law and affirmed the trial court's grant of summary judgment.⁹⁶

⁸⁶ 849 N.E.2d 595, 598 (Ind. 2006).

⁸⁷ Ordinarily in Indiana, a plaintiff's contributory fault does not bar recovery unless it exceeds fifty percent of the total fault proximately contributing to the damages. See IND. CODE ANN. § 34-51-2-5, -6. But the Indiana Comparative Fault Act expressly excludes application to governmental entities and, consequently, the common-law defense of contributory negligence remained applicable to the school. Therefore, even a slight degree of negligence on the part of the man that proximately caused his claimed damages would operate to bar his action against the school. *Funston*, 849 N.E.2d at 598.

⁸⁸ *Id.* at 600.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Hapner*, 699 N.E.2d at 1202.

⁹³ Again, because the driver sued governmental entities, even a slight degree of negligence on the part of the driver that proximately caused his claimed damages would operate to bar his action against the State of Indiana and the Indiana Department of Transportation. *Hapner*, 699 N.E.2d at 1205.

⁹⁴ *Id.* at 1206.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1207.

As these cases demonstrate, Indiana courts are willing to grant judgment as a matter of law where a defendant can set forth facts that a plaintiff's own negligence constitutes the proximate cause of her injuries. Consequently, a plaintiff's own negligence in failure-to-warn cases can be not only a defense under the Indiana Comparative Fault Act, but can also be used to negate plaintiff's establishment of proximate cause. Under *Kovach*, Indiana courts may now be more willing to decide such issues a matter of law in the appropriate cases, even where certain factual disputes exist in the record. By the same token, defendants should carefully analyze whether asserting such defenses is truly warranted under the facts and circumstances of a particular case so as not to abate the effectiveness of such arguments.

V. WHERE PROXIMATE CAUSATION CANNOT BE DECIDED AS A MATTER OF LAW

As previously noted, proximate causation is generally an issue for the trier of fact.⁹⁷ The following products liability failure-to-warn cases provide guidance as to when Indiana courts are disinclined to find a lack of proximate cause as a matter of law.⁹⁸

In *Cook v. Ford Motor Co.*, parents of a front-seat child passenger, who was injured during a vehicular accident when the air bag deployed, filed a failure-to-warn action against the truck manufacturer.⁹⁹ Undisputedly, the manufacturer provided warnings and instructions. However, the parents argued the child's injury would not have occurred but for the air bag instruction failing to *adequately* instruct them to deactivate the air bag for all child passengers sitting in the front seat and/or to specifically warn of the dangers of air bags to children.¹⁰⁰ The manufacturer responded by arguing the lack of air bag instructions did not proximately cause the child's injuries because if the child's parents had heeded the instructions that were already given—to place children in the backseat and to keep them belted at all times—the child's injuries would not have occurred and/or would not have been so severe.¹⁰¹

The court found the adequacy of the warnings to be an issue for the jury. The court reasoned that the language of the warnings provided by the manufacturer was permissive; that is, the warnings equivocally instructed to place children in the backseat “if possible,” and “suggested” that children are safer there and that occupants “should” always wear their seatbelts.¹⁰²

⁹⁷ *Kovach*, 913 N.E.2d at 198.

⁹⁸ See *Cook v. Ford Motor Co.*, 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*; *Lucas v. Dorsey Corp.*, 609 N.E.2d 1191 (Ind. Ct. App. 1993); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145 (Ind. Ct. App. 1990); *Craven v. Niagara Mach. & Tool Works, Inc.*, 417 N.E.2d 1165 (Ind. Ct. of App. 1981).

⁹⁹ *Cook*, 913 N.E.2d at 316.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 328.

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The court explained that even if the Cooks had read all the warnings in the owner's manual, the permissive nature of the warnings would not have changed their conduct.¹⁰³ The court found a question of fact existed regarding the manufacturer's crafting of a warning strong and specific enough to adequately warn the Cooks.¹⁰⁴ The court also noted that the warnings failed to state that injury from front seat air bags constituted one of the risks avoided by placing a child in the back seat.¹⁰⁵ Ultimately, the court held that the manufacturer did not negate any element of the claim as a matter of law because it could not be said that the evidence led to "but a single inference so as to render the issues questions of law, not fact."¹⁰⁶ Finding the manufacturer failed to negate proximate cause as a matter of law, the court reversed the trial court's grant of summary judgment to the manufacturer.¹⁰⁷

The Indiana Court of Appeals issued its opinion in *Cook v. Ford Motor Co.* just a few weeks after the Indiana Supreme Court issued its *Kovach* decision. While two of the five Indiana Supreme Court justices voted to grant transfer in the *Cook* case, with the court having just addressed the issue of proximate cause in a failure-to-warn claim in *Kovach*, this fact may have weighed in favor of the denial of transfer in the *Cook* case.¹⁰⁸

In *Lucas v. Dorsey Corp.*, the plaintiff-worker was injured when an auger from a utility truck fell on top of him. At the time, the plaintiff-worker was in the process of inserting a safety pin to complete the securing of the auger, and the truck's engine was running at one-third speed. The plaintiff-worker brought suit against the successor to the manufacturer and installer of the digger derrick.¹⁰⁹ The operating manual instructed users to operate the engine only at idle speed while stowing the auger. The plaintiff-worker admitted he was instructed on how to properly stow an auger.¹¹⁰ However, the plaintiff-worker argued the control panel of the auger also should have

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 331. The dissent, on the other hand, found that because it was undisputed that the Cooks failed to comply with the instructions to place children in the backseat and to wear seat belts, the manufacturer did not, as a matter of law, breach its duty to warn. *Id.* at 335 (Brown, J., concurring in part and dissenting in part).

¹⁰⁷ *Id.* at 334. The undisputed facts also established that the eight-year-old child unbelted her own seatbelt just before the accident. The court held that because the eight-year-old child "is rebuttably presumed incapable of negligence, whether [the child] failed to exercise the due care required of her for her own safety under these circumstances and, if so, whether her failure was an intervening cause sufficient to break any chain of causation leading back to [the manufacturer] is, at best, a question of fact for the jury." *Id.* at 329.

¹⁰⁸ Frost Brown Todd LLC represented the manufacturer in the *Cook* case.

¹⁰⁹ *Lucas*, 609 N.E.2d at 1195.

¹¹⁰ *Id.* at 1199.

warned the user to stow the auger only at idle speed and of the danger in failure to adhere to the warning.¹¹¹

The court found issues of material fact existed as to the adequacy of the warnings and instructions based on an expert witness's affidavit stating, among other things, that the manual did not adequately warn users of the dangers of stowing the auger at greater than idle speed.¹¹² In addition, the successor to the manufacturer and installer argued there were intervening causes, such that the failure of the control panel to contain the warning did not proximately cause the injuries.¹¹³ Although the record established that fellow employees hit the safety latch with a hammer, the court did not find this misuse to constitute an intervening cause because it was unclear if such conduct occurred near the time of the accident.¹¹⁴ The court agreed that alteration or repairs to the auger or, alternatively, the failure of a dump valve, could have caused the incident.¹¹⁵ Ultimately, the court found it could not determine as a matter of law which of the various factors proximately caused the plaintiff-worker's injuries and, therefore, denied summary judgment.¹¹⁶

In the wake of *Kovach*, it is possible that *Lucas v. Dorsey Corp.* could have been decided differently, falling into the category of cases in which the instructions or warnings were already known by the user, thereby potentially negating proximate cause as a matter of law. However, in *Lucas v. Dorsey Corp.*, the court instead chose to focus on the failure to mention in the warning *the danger associated with* not adhering to the instructions as to the proper storage of the auger.

In *Montgomery Ward & Co. v. Gregg*, the plaintiff sued the tire manufacturer after being injured when the tire he was changing exploded. The plaintiff was putting the tire on the wrong size rim.¹¹⁷ The plaintiff alleged the tire manufacturer failed to adequately warn that the tire could be mounted safely only on a sixteen-inch rim.¹¹⁸ The tire manufacturer knew of the exploding tire issue caused by putting the tire on the wrong size rim.¹¹⁹ On the other hand, the plaintiff claimed not to know of this danger.¹²⁰

¹¹¹ *Id.* at 1198.

¹¹² *Id.* at 1199.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1200.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Montgomery Ward*, 554 N.E.2d at 1150.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1156.

¹²⁰ *Id.*

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The tire manufacturer argued there was a lack of proximate cause, in that the plaintiff's misuse of the tire in putting it on the wrong size rim actually caused his injury.¹²¹ However, the court found that the plaintiff was aided by the presumption that an adequate warning about the appropriate size rim would have been read and heeded.¹²² The court found there was not enough evidence to rebut this presumption even though the plaintiff failed to check the sizes of the tires and rims.¹²³ The court concluded the following facts were insufficient to rebut the presumption: a lack of evidence that the plaintiff knew about the distinctions in mounting tubed versus tubeless tires; the plaintiff's inability to determine the size by reading the manufacturer's markings; the plaintiff's knowledge of the maximum operating pressure of a passenger tire; and the plaintiff's not overinflating the tire beyond that anticipated by the industry.¹²⁴ Consequently, the court found the question of whether the failure to warn was a proximate cause of the injury was appropriately a jury determination and ultimately affirmed the jury verdict in favor of the plaintiff.¹²⁵

While this result appears to be somewhat in line with *Kovach*, wherein the issue could be decided as a matter of law because the court found the injuries would not have been prevented even if the proposed warning had been given. In *Montgomery Ward & Co. v. Gregg*, the plaintiff alleged that an inadequate warning about the appropriate size rim related to the injuries he suffered from the explosion, which itself was caused by failing to mount the tire on the appropriate size rim. However, the failure of the plaintiff to check the sizes of the tires and rims arguably should be sufficient to rebut the read-and-heed presumption.

In *Craven v. Niagara Machine and Tool Works, Inc.*, a skilled tool and die maker injured himself while operating a punch press.¹²⁶ The tool and die maker sued the manufacturer, arguing the manufacturer provided inadequate warnings on the press.¹²⁷ The court stated there was rebuttable presumption of causation when warnings are inadequate because there is a presumption that an adequate warning would be heeded.¹²⁸ But if evidence is produced that rebuts this presumption, the rule is of no further use.¹²⁹

¹²¹ *Id.* at 1150.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Craven*, 417 N.E.2d at 1167-68.

¹²⁷ *Id.* at 1168.

¹²⁸ *Id.* at 1172.

¹²⁹ *Id.*

The manufacturer showed that the tool and die maker had been warned but that he had not listened.¹³⁰ This constituted a sufficient rebuttal of the presumption that the tool and die maker would have heeded an adequate warning since he did not heed the warning he did, in fact, receive.¹³¹ The burden then shifted to the tool and die maker to prove, by direct and circumstantial evidence, that he would have heeded the different warning.¹³² Because the tool and die maker countered by stating he would have listened to a different type of warning, the court held it was a question for the jury and found the trial court's grant of judgment on the evidence for the manufacturer was reversible error.¹³³

While the *Craven* court discussed a presumption of causation (again *Kovach* delineates that the presumption that a plaintiff will read and heed a warning is not dispositive), a plaintiff must still prove proximate causation by showing the danger that would have been prevented by the appropriate warning was actually the cause of plaintiff's injury. Moreover, under the *Kovach* court's willingness to rule on such issues as a matter of law, *Craven* likely may have been decided differently today.

In *Ortho Pharmaceutical Corp. v. Chapman*, a woman who had been prescribed oral contraceptives noticed a bruise on her leg, which turned out to be thrombophlebitis.¹³⁴ She sued the oral contraceptive manufacturer for failure to warn of the risks of thrombophlebitis associated with the use of oral contraceptives.¹³⁵ The court found that the woman benefitted from the read-and-heed presumption.¹³⁶ The manufacturer argued that proximate cause from inadequate warnings was lacking due to the negligence of the prescribing physician and the woman's own negligence in both failing to report preliminary symptoms and using the drug beyond her prescription.¹³⁷

The court rejected the manufacturer's argument. The court found the woman alleged she received no warning that the contraceptive could cause thrombophlebitis; the prescribing physician testified that knowledge of this risk would have made a difference in his prescription; and the woman's alleged negligence was not substantial enough and may have been prevented with an adequate warning.¹³⁸ Given these facts, the court held that the trial court properly denied the manufacturer's motion for summary judgment.

¹³⁰ *Id.* at 1170.

¹³¹ *Id.* at 1171.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Ortho*, 338 N.E.2d. at 543.

¹³⁵ *Id.*

¹³⁶ *Id.* at 555.

¹³⁷ *Id.* at 555-56.

¹³⁸ *Id.* at 556-58.

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ment because the manufacturer did not negate proximate cause as a matter of law.¹³⁹

Again, proximate cause is usually an issue for the trier of fact.¹⁴⁰ These cases demonstrate that often there are disputed issues of fact precluding a finding that proximate cause is lacking as a matter of law. In *Kovach*, the issue could be decided as a matter of law because the court found the injuries would not have been prevented even if the proposed warning had been given, whereas in *Ortho*, for example, the plaintiff alleged an inadequate warning that was clearly related to the injuries she actually suffered.

VI. CONCLUSION

Despite the read-and-heed presumption, *Kovach* signifies to Indiana courts that the lack of proximate causation can be decided as a matter of law under the appropriate circumstances, even where certain issues of fact exist in the record. *Kovach* emphasizes that claimants still bear the burden of proving proximate cause even though they receive the benefit of the read-and-heed presumption. In light of *Kovach*, Indiana courts may be more willing to grant summary judgment in appropriate failure-to-warn cases. Products liability defense attorneys can, and should, use *Kovach* as a tool to seek judgment as a matter of law on proximate cause in suitable failure-to-warn cases. However, practitioners should carefully analyze cases to determine whether they warrant such an assertion so as to avoid diluting the effectiveness of such an argument or to jeopardize Indiana courts' willingness to give such an argument due consideration.

¹³⁹ *Id.* at 558.

¹⁴⁰ *Kovach*, 913 N.E.2d at 198.

