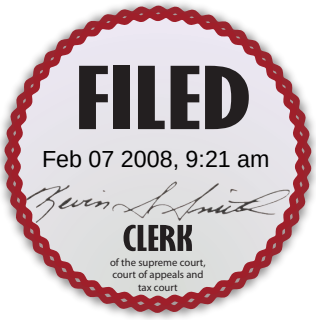

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IN THE
COURT OF APPEALS OF INDIANA

JOHN B. LIND,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A04-0707-CV-408
	)	
MENARD, INC., d/b/a MENARDS, and SCOTCH CORPORATION, a foreign corporation doing business in Indiana,	)	
	)	
Appellee-Defendants.[1]	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D02-0507-CT-94

February 7, 2008

[1] The trial court granted summary judgment to Menards on August 25, 2006. Menards is not a party to this appeal.

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge.

Plaintiff-Appellant John Lind appeals the trial court's grant of summary judgment to Defendant-Appellee Scotch Corporation following his action against Scotch for damages arising out of his use of Scotch's drain cleaning product. Upon appeal, Lind claims the trial court erred in granting summary judgment. We reverse and remand.

BACKGROUND FACTS AND PROCEEDINGS

On June 18, 2004, Plaintiff John Lind purchased a bottled of Guaranteed Hair & Grease Drain Opener, a product manufactured by Defendant Scotch Corporation, from Menards in order to unclog a drain in a bathtub at his home. Upon returning home, Lind read the warnings and instructions on the bottle, including the warnings to "Always wear safety goggles and rubber gloves" and to "Wear suitable protective clothing, gloves and eye/face protection." Appellant's App. pp. 128, 131. Lind wore eyeglasses and wrapped the bottle in a towel, but he did not wear goggles or rubber gloves. Lind then poured approximately two cups of the product into the clogged drain and waited one hour, as directed. He then flushed the drain with lukewarm water from the bathtub faucet. The instructions directed the user to flush the drain with hot water. The drain remained clogged, so in an effort to find the blockage, Lind went to his basement and tried to remove the cap from the drum trap linked to the drain line. The cap exploded off of the drum trap. Lind suffered injuries including the loss of his left eye and a partial vision loss in his right eye, as well as scarring of his face and chest.

Following Lind's July 14, 2005 action against Scotch for damages arising out of the above claimed injuries, Scotch moved for summary judgment. The trial court granted summary judgment on the following basis:

> The Court finds there is no genuine issue of material fact regarding the sufficiency of the warnings on Defendants' [sic] product. The undisputed facts establish that Plaintiff read and understood the warnings and directions for use of the drain cleaner and proceeded to attempt to open a clogged drain contrary to said warnings and directions.

Appellant's App. p. 9. This appeal follows.

DISCUSSION AND DECISION[2]

A. Standard of Review

Under Indiana Trial Rule 56(C), summary judgment is appropriate when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In reviewing summary judgment, this court applies the same standard as the trial court and construes all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. *Payton v. Hadley*, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004). Where material facts conflict, or undisputed facts lead to conflicting material inferences, summary judgment is inappropriate. *Id*. at 438. The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *Id*. The trial court is not required to enter specific findings and conclusions. *U-Haul Int'l., Inc. v. Nulls Mach. & Mfg. Shop*, 736 N.E.2d 271, 275 (Ind. Ct. App. 2000), *trans. denied*. We are not

limited to granting or denying summary judgment upon the same basis that the trial court made its decision. *Id*. This court will affirm a grant of summary judgment if it can be sustained on any theory supported by the designated materials. *Id*.

Lind's claim falls under Indiana's Products Liability Act, which governs all actions brought by consumers against manufacturers for physical harm caused by a product. *See* Ind. Code § 34-20-1-1 (2005). Under this Act, a manufacturer is liable for physical harm caused by any product it places into the stream of commerce which is in a "defective condition unreasonably dangerous." *See* Ind. Code § 34-20-2-1 (2005). A product is defective if the manufacturer[3] fails to: (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product; when the manufacturer, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer. *See* Ind. Code § 34-20-4-2 (2005). Indiana Code section 34-20-6-4 (2005) provides for a defense in product liability actions if the claimant misused the product.

B. Analysis

Conformity with Existing Standards

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[2] We heard oral argument in this case on January 15, 2008, at Indianapolis North Central High School. We wish to thank counsel for their advocacy and extend our appreciation to the faculty, staff, and students of North Central for their fine hospitality.

[3] Although Indiana Code section 34-20-4-2 refers specifically to a "seller," Scotch does not dispute the applicability of this code section. Indeed, Indiana Code section 34-20-1-1 states that it applies to all actions brought "against a manufacturer or seller."

We first address Scotch's contention that summary judgment was proper based upon its designated evidence establishing what it claims was the rebuttable presumption pursuant to Indiana Code section 34-20-5-1 (2005) that its product was not defective. In moving for summary judgment, Scotch designated as evidence a report by human factors consultant Andrew Le Cocq stating that the warnings on Scotch's product conformed with applicable national standards including those set out in 15 U.S.C. § 1261 (2005) and 16 C.F.R. § 1500 (2005). Appellant's App. pp. 65-67.

Indiana Code section 34-20-5-1 provides the following:

> In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:
>
> (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
> (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by an agency of the United States or Indiana.

The regulations set out in 16 C.F.R. § 1500.3 mirror the legal definitions promulgated by Congress in 15 U.S.C. § 1261. Under 15 U.S.C. § 1261(p)(1), hazardous substances are deemed "misbranded" if they do not contain the following specific information on their labels:

> (A) the name and place of business of the manufacturer, packer, distributor, or seller;
> (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name;

> (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic;
> (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances;
> (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard;
> (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission . . . ;
> (G) instruction, when necessary or appropriate, for first-aid treatment;
> (H) the word "poison" for any hazardous substance which is defined as "highly toxic" . . .;
> (I) instructions for handling and storage of packages which require special care in handling or storage; and
> (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard . . . .

While Le Cocq's report lists and finds Scotch in compliance with factors A, B, E, F, G, H, I, and J above, it very noticeably skips any reference to or analysis of factors C and D, neither of which Scotch's product appears to comply with. Appellant's App. p. 66-67. Factor C requires a signal word of "DANGER" on substances which are corrosive, as Scotch's product plainly states that it is. Factor D requires the signal word of "WARNING" or "CAUTION" on all other hazardous substances. None of the above listed signal words appears in the specified manner on the label.[4] Because the designated evidence demonstrates that Scotch's product does not comply with the very national standards listed by Scotch's expert as applicable, we are unconvinced that Scotch demonstrated compliance with applicable standards adequate to demonstrate a presumption of nondefectiveness. Scotch's

[4] We recognize the product contains the phrase "Doing so can result in dangerous reactions or gases[,]" and instructs the user to "Read Cautions On Back Panel." App. pp. 128-29. We are unconvinced

noncompliance with this national standard further buttresses our conclusion addressed later in this opinion that there exists a genuine issue of material fact concerning the adequacy of the warnings and instructions for this product.

Scotch did not develop an argument that, in the alternative, its product was entitled to a presumption of nondefectiveness because it complied with the generally recognized state of the art under Indiana Code section 34-20-5-1(1). In any event, Lind introduced evidence rebutting any argument to that effect, specifically a label from another drain cleaner referencing the risk of blindness and eruptions, and instructing the user to call a plumber. Appellant's App. p. 132. While Lind's alternative label evidence arguably similarly fails to comply with the above national standards, we conclude that the existence of an alternate label, together with Scotch's product's failure to comply with national standards, adequately rebuts any claim by Scotch that it is entitled to a presumption of nondefectiveness based upon any alleged compliance with the state of the art. Accordingly, we reject Scotch's contention that summary judgment is proper on this ground.

Defense of Misuse

In granting summary judgment, the trial court largely based its decision on Lind's failure to comply with warnings and instructions on the product label. Scotch defends the trial court's judgment on this basis by arguing that as a matter of law, a warning cannot be

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that these references, contained within phrases, to "dangerous" and "Cautions" somehow satisfy the requirement that they be fully capitalized signal words.

deemed inadequate if the product is used in a manner specifically warned against by the label.

Contrary to Scotch's claim, the defense of misuse of a product under Indiana Code section 34-20-6-4 has not been interpreted to act as a complete bar to recovery. Due to the General Assembly's 1995 requirement that comparative fault principles apply to products liability cases, this defense has instead been interpreted to provide for an allocation of the claimant's fault, to be included in the larger comparative fault analysis pursuant to Indiana Code section 34-20-8-1 (2005).[5] *See Barnard v. Saturn Corp., a Div. of Gen. Motors Corp.*, 790 N.E.2d 1023, 1029-31 (Ind. Ct. App. 2003), *trans. denied* (concluding that the defense of misuse as provided for in Indiana Code section 34-20-6-4 included the use of a product in contravention of warnings and instructions and that such defense was not a complete bar to recovery but rather an allocation of fault to be considered under the comparative fault scheme).

Scotch's authority for claiming Lind's use of the product in contravention of the warnings constituted a complete bar to recovery is *Peters v. Judd Drugs*, 602 N.E.2d 162, 165 (Ind. Ct. App. 1992), *trans. denied*. In *Peters*, this court, in affirming summary judgment in favor of a pharmacy supplier, determined that there was no genuine issue of material fact as to the defectiveness of a poisonous product where it was not foreseeable that

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[5] Indiana Code section 34-20-8-1 provides, in pertinent part, that "[i]n a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact. . . ." The Indiana Supreme Court, prior to denying transfer in *Barnard*, observed that two cases had held that the defense of misuse was not a complete defense under products liability law but declined to express an opinion on that issue. *See Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1148 n.3 (Ind. 2003).

it would be used for medicinal purposes or that the user would fail to read the label or warning. 602 N.E.2d at 164-65. In determining the lack of defectiveness as a matter of law, the *Peters* court relied upon the language of current Indiana Code section 34-20-4-3 (2005), which provides that a product is "not defective . . . if it is safe for reasonably expectable handling and consumption" and that, "If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the [manufacturer] is not liable . . . ."

Contrary to *Peters*, where a laboratory chemical was somehow mistakenly stored in a medical supply room and then administered to a patient, here Lind was using Scotch's product for the purpose intended, namely to unclog a drain. Given the facts that Scotch's warnings sought to prevent the very manner in which Lind used the product, and this court's determination in *Barnard* that a claimant's use of a product in contravention of warnings constitutes misuse under Indiana Code section 34-20-6-4, we conclude the *Peters* analysis is inapplicable here and that, contrary to Scotch's argument, summary judgment cannot be justified under Indiana Code section 34-20-4-3.

While, pursuant to *Barnard*, Lind's alleged misuse of Scotch's product, in and of itself, cannot serve as a complete bar to recovery justifying summary judgment, we recognize that summary judgment would nevertheless have been proper if no reasonable trier of fact could find that Lind was less at fault than was Scotch. *See* Ind. Code § 34-51-2-6 (2005).

In *Barnard*, this court affirmed a grant of summary judgment where the victim, who was killed after being pinned under his car while using a jack, disregarded multiple warnings and instructions regarding the proper use of the jack including that it be used on a level

surface, that the user not position himself underneath the vehicle with only the jack's support, and that the user place blocks behind the wheels of the vehicle while using the jack. 790 N.E.2d at 1031. There was also evidence in *Barnard* that the jack was placed on top of a block of wood. *Id*. In affirming summary judgment, the *Barnard* court determined that the circumstances of misuse were such that no reasonable trier of fact could have found the victim was less than fifty percent at fault for his injuries. *Id*.

In *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 529 (Ind. Ct. App. 2004), *trans. denied*, this court similarly upheld summary judgment based upon the claimant's own actions, where the claimant, who was aware of the existence of power lines, understood the risk of hitting them, and understood how to operate an overhead mechanical tarp device attached to his trailer, simply failed to pay adequate attention to his surroundings when raising the tarp over his trailer, resulting in the tarp hitting power lines and his being seriously injured. In so ruling, the *Coffman* court determined that the evidence overwhelmingly demonstrated that the claimant's negligence in failing to pay attention to his own actions and surroundings exceeded any total alleged negligence on the defendants' part such that no genuine issue of material fact existed. *Id*. Judge Bailey dissented, however, emphasizing the view that fault apportionment under the Indiana Comparative Fault Act was uniquely a question of fact to be decided by a jury. *Id*. at 530; *see Paragon Family Restaurant v. Bartolini*, 799 N.E.2d 1048, 1056 (Ind. 2003). As Judge Bailey acknowledged, although there is some point at which the apportionment of fault may become a question of law for the court, this point is reached only when there is no dispute in the evidence and the factfinder is able to come to only one logical conclusion. *Id*. at 530-31.

In the instant case, consistent with Judge Bailey's reasoning in *Coffman*, we are unconvinced that this is a case where only one logical conclusion exists with respect to the apportionment of fault. Here, although Lind wore glasses instead of goggles and used a towel instead of gloves, any fault on his part for failing to strictly comply with all of the warnings and instructions could arguably be outweighed by Scotch's alleged failure to indicate that its product would remain caustic and posed a risk of blindness even after the recommended time period had lapsed; that the water used to flush out the pipe would not serve to dilute the product; and that in spite of the product's guaranteed effectiveness, it would possibly prove ineffective after the first application. Given these facts suggesting the warnings and instructions may have been incomplete and misleading, there is more than one logical conclusion as to the relative apportionment of fault.[6] We therefore conclude that summary judgment on the basis of Lind's failure to follow warnings and instructions was error.

Adequacy of Warnings and Instructions

Having rejected Scotch's claim to what it argues was the complete defense of misuse, we turn next to the trial court's additional conclusion in reaching summary judgment that there was no genuine issue of material fact as to the sufficiency of the warnings and instructions at issue. Of course, if the warnings and instructions were adequate as a matter of law, our above determination that Lind's comparative fault was a factual matter properly submitted to a jury would prove purely academic.

[6] We do not wish to convey that this court has made a determination as to a proper allocation regarding percentage fault, only that a genuine issue of material fact exists in this determination.

But we disagree with the trial court that the warnings and instructions here were adequate as a matter of law. Under Indiana Code section 34-20-4-2, a product is defective if the manufacturer fails to (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product. The adequacy of warnings and instructions is generally a question of fact for the trier of fact to resolve. *See Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007). In the instant case, the warning label identified the risk of severe burns and instructed the user to "wear safety goggles and rubber gloves" but also to "[w]ear suitable protective clothing, gloves and eye/face protection." App. pp. 128, 131. Additionally, the label, which guaranteed the product's effectiveness, instructed the user to "[f]lush with hot water" and to "[a]llow to stand for at least 1 hour before flushing. Overnight is best." Given Lind's use of eyeglasses, his use of lukewarm water, and his waiting one hour for the product to work before taking action which he was never warned against taking, all in arguable compliance with the instructions, and given that he arguably suffered not just "severe burns" but blindness, there appears to be a question of fact as to whether the warnings and instructions were adequate.[7] Indeed, Scotch's apparent lack of compliance with federal standards only serves to reinforce our determination on this point Accordingly, we conclude summary judgment cannot be sustained on this basis.

[7] We find it unnecessary to parse the language on the product in order to consider as separate questions the adequacy of the warnings and the adequacy of the instructions. *See Barnard*, 790 N.E.2d at 1031-33 (considering warnings and instructions jointly).

Having concluded that Scotch is not entitled to a rebuttable presumption of nondefectiveness, that allocation of fault in this case is a proper determination for a factfinder and that the adequacy of the warnings and instructions cannot be determined as a matter of law, we reverse the trial court's summary judgment in favor of Scotch.

The judgment of the trial court is reversed, and the cause is remanded for a trial on the merits.

DARDEN, J., and ROBB, J., concur.