

Chapter 1: Introduction to American Law

Introduction to an Introduction

This book's agenda is to introduce readers to the settlement in the global village that is American law. Because American law is as much a process as it is a bundle of institutions and rules, our mandate is not merely to provide a sketch of jurisdictions and legal principles. To be sure, the reader will encounter legal rules. He or she will learn "diversity of citizenship" coupled with \$75,000 in controversy triggers federal jurisdiction. Likewise, we will discuss whether a contract is binding without consideration. These snippets of procedural and substantive law are of use to a lawyer, albeit limited. What lawyers, American or foreign, must learn is the reasoning that underpins a rule of law: to determine what diversity of citizenship means in a specific context; or how courts have defined consideration so that one may measure doctrine against the facts at hand.

Thus, this does not aim to be a compendium of laws, but rather, it proposes to introduce its reader to the foundations of American jurisprudence; how the American system of law approaches the making of legal rules, and how it engages in both dispute prevention and resolution. It strives to reveal American law's subtext, the shared understanding about the law that American lawyers have digested. Upon assimilating this background, lawyers in America can find, understand, use, and argue law. The latter lesson is well-learned because, above all, the law in American society is rarely fixed, and it is usually in the process of dialogue and disputation. Once the code that is American legal discourse is cracked, assimilated, and the rudiments of American law understood, the determination of individual principles can be discerned quite easily, and a foreign lawyer can be invited into the seemingly endless dialogue.

Alas, though rewarding, ours is an arduous journey. All this learning generally requires the average American college graduate three years of serious study. After four years of immersion in most any of the liberal arts or other field, the graduate is deemed prepared to be thrust into law school: three years to learn the law, to take the bar exam of a particular state, and then begin to practice as an attorney in that lone jurisdiction. Why not allow our newly-minted lawyer to practice all over the country? The answer is simple: though non-Americans generally view the United States as an undifferentiated political mass, most of its law is enacted in state legislatures and decided and enforced in state courts. National law, though relevant and important, is limited to defined areas. One's birth, marriage, and death are registered according to state law.

American Law: Rife with Contradiction

American law, like America itself, is riddled with contradictions and paradoxes. Professor John Reid has argued that American society was, before the twentieth century, "*law minded*." In his study of law on the Oregon Trail, there was very little evidence of violent crime against persons and property. Americans beyond the law were largely self-regulating, "law-minded."

Much time can be devoted to discussing the nature and reliability of his evidence, but assume that Reid is correct: what does law-minded mean? Social and economic relations can and should operate without law enforcers. It could operate upon those within reach of the law, as well as beyond the law. The law should be understood and observed intuitively. Just as complex ideas of government were reduced to a few words in the Constitution, private and public law should be redacted into a simple set of uncomplicated principles.

Of course, neither American private law (nor the public law) turned out that way: hence the contradiction. Why not? The response is a relatively easy one: the lawyers. No society disdains lawyers as much as does

Americans. Though disdained, the law, and the lawyers that create and distort it, those who have fashioned the contradiction have become a national obsession. This ambivalence is another part of our national character. Switch on the hundreds of channels of cable television in an American hotel room (or log on to Netflix or another streaming service), and you will probably land on a dramatic depiction of lawyers and the law. “Lawyer shows” abound. Americans are obsessed with the law and the legal system that they purport to hate.

American Law: Complexity

Presumably, this law, which Americans may desire to be intuitively discerned, should be simple. Regrettably, the contrary is the case; modern American law is hopelessly complex. Again, the contradiction emerges. From a law that could and should be followed intuitively, American lawyers have imposed a legal order that is hopelessly complicated.

Modern American constitutional law inhabits a world of its own. No discipline of the law is more contradictory than constitutional law; no analytical framework is more arcane. Indeed, analysis requires the assimilation of a large body of vocabulary specific to constitutional analysis and one that is absurdly nuanced. For example, in determining whether a statute violates a provision of the United States Constitution, courts use the following varying standards of review depending upon the constitutional provision in question: strict scrutiny, heightened scrutiny, intermediate scrutiny, loose scrutiny, rational-basis scrutiny, and so on. The differences among them are frighteningly arcane. Likewise, only specialist constitutional lawyers can aspire to understand with precision the structure of the debate over federalism, separation of powers, and individual rights, let alone the nuances of constitutional interpretation.

Likewise, much of the same can be said about a variety of areas of private law. Oliver Cromwell, the revolutionary who led the British Isles as Lord Protector from 1653 to 1659, referred to the common law of England in the seventeenth century as an “ungodly jumble.” It still is, and American law, though no longer strictly governed by the common law, remains at the very least complicated. I defy one to try to explain the difference between the following two future interests in land developed by the “common law”: a vested remainder subject to open and to divestment and a contingent remainder. Similarly, American statute law is complex, and for law students and citizens alike, unreadable. And there is a lot of it: state and federal. When you have a moment, browse the United States Tax Code. If American law began with the notion that it should be a law “of the people,” it is now a law for lawyers and specialty lawyers at that.

American Law: The Moral Dimension

Like the thirteenth colonies, American law began its journey, above all, following a moral or cultural design. Our settlement was to be (largely) “a city built on a hill.” American law strives to fulfill the moral imperative that governs the legal relation of those who dwell on this now quite large and far more densely-populated mountain range. But the idea that there is good law, just law, and bad law, unjust law out there remains. America’s goal must be for its legal order to strive to find the righteous path. Just like America believes that its foreign policy is driven by moral rectitude, so too it is believed that its legal order should be so governed. That others might not perceive it precisely that way may be interesting but beside the point. The goal of American law, then, must be “to dream the impossible dream,” an ever-striving process of discovering what is the right law, the moral imperative of law, what the law in a given circumstance should be. Of course, just as lawyers led us down this path from law-minded to law-hating, they may have diverted us from a morally just law. Their interest in law is as a businessperson and not as a moral theologian.

And Finally, American Law: Diversity

A final stab at oversimplification is the much-worn term: diversity. In America, one is never at a loss for law and lawgivers. Countless levels of government are constantly churning out the law. American law students are subject to a myriad of law: the “law” of Tulane Law School; the “law” of Tulane University; that of the city of New Orleans; of Orleans Parish; of the state of Louisiana; and, of course, of the law of the United States. There is enough law in America for the conscientious foreign lawyer to spend many years in active, painstaking, and detailed study. And from time to time each lawmaking sovereign seems to have a different idea about what the law should be. Recently, the legislature of the state of Louisiana believed that it was within its power to limit doctors who provide abortion services within its borders to have admitting rights in hospitals within a 30-mile radius of their clinic. The United States Supreme Court thought otherwise. So, America, like all federal states, has a hierarchy of law, and one not easy to delineate, which we shall try to come to understand.

American society, then, is marked by ambivalence towards law; the belief in law as a moral exercise, and disdain, or at the very least, suspicion of and for formal law. The latter has led Americans over the course of the half-century (if not longer) to find “alternatives” to law, and in particular, to the courts. Alternative dispute resolution is frequently on the minds of commercial actors and their lawyers, though it also was current in the reign of William III when colonial “Americans” were British subjects. The contemporary preference has seemingly turned from litigation in the courts to arbitration, mediation, negotiation, neighborhood courts that are not courts, and the like. Though procedures are streamlined and law a bit less arcane, lawyers are as omnipresent in the process of alternative dispute resolution as they are in the courtroom.

A Page of History

An introduction to an introduction, like this one, cannot conclude without addressing American law’s glorious past. If American law reflects the spirit of the American people, some understanding of our history must be required. Once again, there is a need to be concise. That’s what “Nutshells” are about! America’s history and its legal history can and do fill the pages of learned monographs. Our incursion will be brief.

Of legal history, Oliver Wendell Holmes, perhaps America’s most erudite jurist, once remarked that “a page of history is worth a volume of logic.” Though he dabbled in the discipline, he also wrote that “there must be better reasons for adopting a rule other than that it was law in the reign of Henry IV.” A contradiction? American lawyers ascribe to both. History can and does shed light on the meaning of the law; but history ought neither to direct nor should it mandate its present guise. Before moving on, then, with apologies to Mr. Justice Holmes, *a page or so of history*.

Once upon a time, there were many laws. European settlers came to a continent that had some notion of law; Native American tribes were not lawless. Foremost amongst the foreign law transplanted was English law; royal law, the statutes, and the common law. Royal law was both a legal system and an amorphous body of principles of substantive law, and to the extent it was applicable, it governed a very different economic and social order. It crossed the Atlantic with the colonists, though likely in its most rudimentary form. But there were in England other forums and other laws, church courts, borough courts, and local courts. America continued to function “in English ways” for lack of viable alternatives. English law in the colonial period, both the common law and statute, was perhaps less complex than in the mother country, and it became deeply imbued with both religious and secular morality to varying extents in different colonies. Likewise, diversity with respect to forum and substantive law applied has always been a part of the English legal system.

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Recall also, however, that other European settlers pillaged the North American continent. They brought with them Dutch and Spanish, and of course, French law. Successive colonization, therefore, added further layers: more diversity to a diverse law. And colonial law reflected this mix. As British rule was ensconced in the North American colonies, the law therein became diverse: the law of Anglican Georgia was the Anglican gloss on English law. Maryland, the Catholic, Massachusetts, the Puritan.

But, how long could these European legal principles and procedures continue unaltered in this virgin territory? The colonies had their own economic orders, and therefore, forged their own wrinkles and glosses on this polyglot that is called the English common law. Each settlement, then each colony, had its own courts and its own law. Supervision from across the pond, from England, was minimal. The colonists had little use for lawyers, and what little English law they knew was derived haphazardly from the few texts that crossed the Atlantic. In the latter years of colonization, the most popular was Sir William Blackstone's *Commentary on the Laws of England*, an admirable volume, but one written for a different audience than colonial lawyers, and with a different agenda: to acquaint the ruling elite of the mother country of the basic tenets of English law and its innate superiority to the law of other European nations. The work was originally published by the Clarendon Press at Oxford, 1765-1770. It is divided into four volumes, on the rights of persons, the rights of things, of private wrongs and of public wrongs. An American edition published in Philadelphia between 1771-72 sold out its first printing of 1,400 and a second edition immediately appeared. Nevertheless, Blackstone was neither compiled to educate lawyers nor was it intended to serve as a codification of the English legal system. But it served as the colonists' guide thereto.

Diversity and naivete were, therefore, terms that might aptly characterize the American legal order during the colonial period. The Revolution, of course, had a great impact on American law. In one area of the law, constitutional law, new ground was surely broken. In the area of private law, change was incremental. At first, the English common law was received into the decisional law of the newly-forged states *en masse* to the extent that it was not contrary to the federal and state constitutions. Because the economic and social environment of the republic differed so fundamentally from that of the mother country, the common law had to be Americanized. That speedily occurred in the early nineteenth century.

What does "Americanization" mean? For much of the nineteenth century, America was a frontier society. A new continent had to be settled; huge amounts of land were given away to encourage that process; enterprise had to be fostered to tame the wilderness. Land law had to conform; it had to protect the rights of occupiers of land who put the soil to productive use, rather than to others who might claim title. Likewise, industrial development had to be promoted, and the law could assist, or at the very least not impede it. Like American economy and society, American law could not be static; rather, it had to be dynamic. Thus, the law of nuisance first encouraged industrial enterprise by continuing to allow the first use to which land was put (and therefore, ultimately, protecting existing use) even if it was noxious and conflicted with a more benign use to which neighboring newcomers wished to put their land. As industrial and commercial land exploration burgeoned, a different balance had to be struck between protecting enterprise and promoting competition and one that would bring about more investment in growth. Likewise, with respect to the railroads, the key to both the geographical and economic expansion of the new nation, tort law was initially hostile towards finding the railroads liable for negligence to encourage investment in the "iron houses." Later, as the population grew and the need for expansion was less critical, tort standards became more favorable to passengers and to bystanders injured in railroad accidents.

In addition to economic expansion, much of the nineteenth century in America was devoted to the debate over slavery, the American Civil War, and the ensuing Reconstruction. Because it supported the slave system, law, both federal and state, was very much involved. The debate over slavery, and the extent to which it should be contained to existing states as the country expanded, was also an economic, political and moral discourse. Perhaps the most interesting single case to read is the much-debated *Dred Scott v. Sandford*, 60 U.S. 393 (1856). Although the viability of slave state economies is a continuing controversy amongst historians, southern states in the antebellum period had little doubt that their “peculiar institution” was at risk if further expansion occasioned admission of a greater number of free states (one in which slavery was not permitted). The Civil War devastated a generation, and after two decades of federal involvement in “Reconstruction” of the former Confederacy, interest was lost in improving the economic and political conditions of the former slaves, leading to more than a century of second-class citizenship for the descendants of slaves.

The experience of the Civil War and Reconstruction seems to have left America with little taste for national, as opposed to state, government. The half-century after Reconstruction witnessed cycles of economic boom followed by a bust. It would take the Great Depression and the two World Wars to create the enormous social and economic problems that cried out for national solutions. President Franklin Delano Roosevelt’s New Deal, a plan to combat the most serious economic downturn that the nation has ever suffered, brought the federal government into the forefront of American economic life and witnessed the beginning of the federal regulatory state, the institution of what has been termed the “alphabet soup” of federal agencies, the SEC (Securities and Exchange Commission), the SSA (Social Security Administration), the FCC (Federal Communications Commission), the FTC (Federal Trade Commission), and the like. Thereafter, the role of the federal government was further strengthened; the Second World War and the Cold War required an active well-armed military which placed enormous demands on the public purse. Likewise, the civil rights movement brought the federal government into the forefront of the struggle for racial equality, a work-in-progress, and to fashion an American version of the social and economic safety net that modern governments provide.

Thereafter, for many Americans, history blends with current events. A county united at war, hot or cold, became divided by the variety of social and economic issues that separate so-called “conservatives” and “liberals.” The liberal Democratic decade of Kennedy-Johnson administrations gave way to a conservative Republican reign of Presidents Nixon-Reagan-Bush (with a brief Carter interregnum), which passed on to Democratic President Clinton and then back again to another President Bush. He was followed by the Democratic, President Obama, the first African-American President. President Trump followed in his wake. Americans seem undecided as the proper ideological bent it desires for occupants of the White House.

Exactly what ideological forces actually drive the political divisions in the United States is a matter for debate. Although conservatives claim to be driven by a nation of lean government, freedom from governmental interference, and fiscal restraint, there is little evidence that the nearly two dozen years of conservative rule has actually furthered that aspect of their articulated political agenda. The conservative President Trump is said to preside over the largest number of federal employees in history if government contractors are included. Much the same can be said for the liberals, who though they espoused greater economic intervention by government, and in particular, a kinder, gentler approach to social programs for the poor, delivered a reform of the welfare system in the 1990s, which eviscerated the partial successes of President Johnson’s War on Poverty of the mid-sixties and that seems to have eliminated almost everyone from the welfare rolls. Likewise, the division is said to be directed by a different view of the role of law, and particularly the function of the federal courts in interpreting individual liberties in the United States

Constitution's Bill of Rights. Though conservatives decry judicial activism and liberal espouse the evolution of protection consistent with contemporary values, the position of judges, conservative or liberal, often seems to be driven by outcome rather than a conception of the proper role of an unelected judiciary in a democracy.

Conclusion

Reducing the first principles of American law to a very few, as we have done here, is fraught with risk. One navigates between the Scylla of confusion and the Charybdis of oversimplification. The relationship between law and society and the economy is critical in trying to make sense of where we are and where we have come from in the American journey. This conundrum does not make it any more straightforward to explain American law to the non-American lawyer. Suffice it to say that complex society, one rife with inner contradictions, has produced a multi-faceted law that we are about to describe.

Chapter 2 - The Sources of Law and Common Law Reasoning

Introduction

A wild fox is running across a public beach, chased by a hunter. As the huntsman is about to catch him, another, an interloper, grabs the fox and carries it away. Believing himself wronged, the huntsman seeks your legal counsel. How would you advise him? To what sources of law in your own legal system would you have recourse?

Nearly two centuries ago, another huntsman called Post entered his lawyer's office to complain that a fellow called Pierson behaved exactly as did the above interloper. That the case went to the highest court in the state of New York may seem remarkable given the value in controversy, that of a fox pelt, but then and now, Americans are by disposition litigious. That the case is still studied is perhaps even more extraordinary. No American law student gets his or her J.D. degree without coming to terms with (or not, as the case may be) the case of *Pierson v. Post*.

The Legal Saga: Framing the Issue

Neither the progress of the action nor indeed its outcome is in itself remarkable. The huntsman Post sued the interloper Pierson for the fox (or, more specifically, its value since it had probably long since been made into a hat or stole) on the grounds that Pierson had appropriated his property. Stated simply, Post's counsel alleged that the fox was his client's property and that Pierson had wrongfully carried it away. The response from Pierson's counsel was equally straightforward: "No, it wasn't your property." The trial court awarded the value of the fox to the huntsman Post, but the Supreme Court of New York reversed, and oddly enough in a split decision, the majority held for the interloper Pierson, though Justice Tompkins, who wrote for the majority, duly noted that Pierson's conduct was discourteous.

Lawyers, of course, are required to phrase disputes at law in abstract legal terms. They are paid to translate transactions and disputes into legal parlance. So, the huntsman's lawyer did not merely march into court, tell the judge the sad tale, and demand justice for his client. Rather, he sued out a writ of trespass on the case, a common-law writ in use in New York in the nineteenth century, though its origins hark back to medieval England, one that joined a single legal issue between the two parties, huntsman and interloper. Writs at common law were essentially entry tickets into court; today, they are called "complaints," at least in Federal court. One began a cause of action at law by issuing a writ that summoned the defendant to court to answer to the formulaic allegations in the writ. Writs were specific to

a particular cause of action. They outlined the elements of a particular claim. To prevail on an action in trespass on the case, the plaintiff, huntsman Post, had to allege and prove that another, here the defendant, the interloper Pierson, had interfered with his property. Because the huntsman Post never had the poor reynard in hand, he must have claimed that he acquired his property right by merely chasing it to the point at which interloper Pierson intervened in order to claim the property in the fox. Counsel for Pierson, on the other hand, argued that Post could have acquired no such right by merely chasing the fox, and that the clever beast remained “unowned” until Pierson reduced it to his physical possession and carried it away.

So, the judges were rightly presented with what one of the learned judges, Justice Livingston, called a “knotty problem:” when does a person acquire property in a wild animal? Or to phrase the issue in more abstract and cosmic terms: how and when does society allocate property rights over things to individuals? A knotty problem, indeed, and not one confined to eighteenth-century jurisprudence. Are not similar questions of acquisition really the essence of intellectual property law? When does an idea floating out there (or running) in the minds of authors and inventors become copyrightable or patentable?

The Search for Law

Contrary to the views of American law students judges, past and present, just do not make up the law as they go along. Post is a good chap; Pierson a scoundrel; verdict for Post. While that analysis might explain the verdict in the trial court, the justices of the Supreme Court of New York in the case did what judges in modern America do: they looked for controlling law that would dictate the outcome. The American legal system has sources of law, and judges must ferret them out and apply them. The highest source of law in the United States, proclaimed in Article VI, is the Constitution of the United States itself, as well as laws and treaties of the United States adopted pursuant to the processes set out in the Constitution for enactment and ratification; they are proclaimed to be the supreme law of the land. Unhappily for the justices in *Pierson v. Post*, the founders and early American legislators were occupied with other more trying issues. Federal law, though admittedly supreme, was decidedly silent on the issue before the court: the acquisition of rights of property in wild animals. And indeed, since the ambit of federal law is limited by the Constitution to particular subject matters, and property in wild animals was not one of them, Congress probably would have had no business allocating rights in property in foxes on public beaches in the state of New York anyway. The American system of law, which we shall refer to as “our federalism,” allows the states to make law in most areas of property rights. So, the focus of the justices shifted down a jurisdictional notch. New York law should resolve the knotty problem. But unhappily, neither the Constitution nor the legislature of the state of New York had turned its attention to the issue. And municipal law was likewise silent; ownership of the fox was a lacuna in the relevant law. So, was the search for law at its end?

Enter the Common Law

Not yet. New York is, and indeed all states, save Louisiana, are (and even judicial reasoning in Louisiana follows the American model), of course, common law jurisdictions. We must now confront this awkward term, mentioned in the first chapter, but where definition was studiously avoided, and at least try to explain its meaning. The common law is both a set of legal rules and system of analysis. It was forged in the English royal courts in what is often referred to as the Middle Ages, where it began as a dialogue between judges and lawyers, the judges themselves generally drawn from the elite of the legal profession. The substantive common law was seen as a basket of principles that could be applied to resolve actual disputes between the kingdom’s subjects. Just what these principles were and how they were found is difficult to divine. Reason, natural law, logic, customs, and previous decisions, as well as the

interpretation of statutes, were all used by litigants to argue their cases in the royal courts, and therefore could be said to be components of the common law. Cases correctly decided added to the body of common law; they were precedent, and though possibly not binding, they would be used to resolve similar disputes, newly-decided cases grafted on to this existing, yet amorphous, body of common law.

Although largely principles of private law (contract, tort, and property), the common law also came to embody certain constitutional principles, and in particular, the notion that monarchical power in England was not absolute. Just as certain principles of common law govern private rights, there were certain principles that limited the sovereign hand in dealing with its subjects. The clash between royal power and notions of its limits arose most frequently in the area of taxation, where consent of Parliament came to be required to levy charges on the people, and in disciplining rebellious subjects, where imprisonment without trial was precluded in the Great Charter of 1215, the much-revered *Magna Carta*. These two limitations on sovereign power very much informed discussion between the American colonists and their sovereign, George III, and led finally to the American Revolution. Ultimately, the United States Constitution addressed many of the issues of sovereign power that had so vexed and troubled the colonists until they rebelled.

Having operated largely under the common law before the Revolution, the newly created states received it into their private law to the extent that it was not inconsistent with newly-created state constitutions and statutes adopted pursuant thereto. In the course of the following century, the common law was “Americanized,” that is to say, the same dynamic processes of legal reasoning that were employed to create and then to elaborate upon the common law in England continued to refine law in America. The arguments of lawyers and judges, in cases between parties, transformed the received common law into a body of principles more consistent with economic and social conditions and aspirations of the young nation. Because private law was state law, the several states might adopt rules of decision that varied, again due to the very different economic and social realities of the several states. Likewise, the nineteenth century witnessed the rise of a nascent regulatory state; legislatures began to enact statutes, which could and did vary from state to state. It was not until the close of the nineteenth and the beginning of the twentieth century that a movement began to rationalize and make uniform the private law of the American states, a goal which has yet to be achieved fully.

But the common law system also embodies a process. Return to our fox. After constitutions and statutes were consulted, recourse would then shift to decisional law. Had the courts of the state of New York addressed the issue of wild foxes on public beaches? Apparently not. And those of the sister states, likewise. And on the other side of the pond: what saith the English common law? But there was no English precedent either. Suppose there was? Would the case have been resolved by reference to precedent? Perhaps, even probably, but not necessarily. The use of the term raises questions about whether previously-decided cases, precedent, would necessarily control the outcome of our tangle between the huntsman and the interloper. Now, if a case that had exactly the same facts had been decided one way or the other, say in favor of an interloper, Post’s counsel would have had a tough row to hoe. Yet, if the case that touched upon the same issue was factually similar, but not precisely the same, all might not be lost for Post. Common law reasoning allows a lawyer to attempt to distinguish the case at bar from a previously decided case. One side might argue that precedent controlled, and the other might try to distinguish the facts and circumstances from the case in litigation and argue that it did not.

Happily, the court did not have to consider whether the outcome was directed by another case, and if so, whether the court was bound to follow it, or since the court was the highest in New York, repudiate the existing rule and articulate another, to revise the common law. The court could not ignore the constitution or statute law, but it could (and this is done rarely) have decided not to apply its own judge-made law. It

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could have found certain critical facts and circumstances sufficiently different to warrant a different outcome. For example, suppose the other case cited as precedent involved hunting elephants on private land. Is the hunted creature (non-indigenous rather than indigenous) or the venue (on private rather than public land) significantly different from the case at bar to warrant a different outcome?

Or the court could have decided that it was time to change the law because times have changed. The underlying logic of the previously decided case sometimes no longer fits contemporary conditions. After all, precedent binds, as Sir Edward Coke, the great champion of the common law in the late sixteenth and early seventeenth-century England, noted, not because it is simply there, but because the judges in the past had confronted the same issue and proclaimed a reasoned opinion. It is the logic within the past case that binds, not merely the fact that it was decided one way or the other. A wrongly reasoned case was not precedent, any more than a statute that had not been adopted in accordance with the legislative process was law. A case decided in the past may no longer serve societal interests and should be overturned. Because the common law should guide individual actions to the same extent as the Constitution and statute law, modifications or reversals of the common law are not undertaken freely and without due regard to the rights of the individual parties to the suit. Yet, the common law is not static. Indeed, sometimes the judges will enforce the “old” law in the case at bar but announce that the court is inclined to follow different law for the future.

But there were no cases anywhere! *Pierson v. Post* was a case of first impression. Rights in wild animals as they were being pursued had not been allocated at common law. It was up to the court to find the law elsewhere. And in *Pierson v. Post*, the court ranged far and wide. The majority pondered many learned souls and adopted the view of Barbeyrac: ownership in wild animals occurs when they are “wounded, circumvented or ensnared . . . so as to deprive them of their natural liberty.” A reasonable rule; but why did they select that one? Was it because they revered Barbeyrac? Did they feel bound by his wisdom, or was something else controlling the agenda?

Policy Concerns

The genius of judge-made law is directly related to the wisdom of the judges. Both the majority and the dissent in *Pierson v. Post* probably looked to logic in order to decide the case. The judges applied predispositions, perhaps differing ones since one judge dissented, about what goals the law should accomplish. In his dissent, Justice Livingston was persuaded that economic efficiency mandated a judgment for Pierson. While law and economics is a formal area of study in the legal academy, the common law has probably considered the effects, economic and otherwise, of a judgment and a rule before instructed to so by modern law professors, Justice Livingston’s logic went like this: foxes are noxious beasts; they disturb farming, a noble and necessary occupation in our state; who would hunt, expend labor (not to mention keep numerous hounds to assist in the chase to rid the country of these noxious animals if the fruits of such effort could be whisked away by another? Allowing the huntsman his property right in the fox after having chased him for a good long time until upon the verge of reducing the beast to possession, would provide the required incentive. More broadly phrased, the law should encourage investment and enterprise. Justice Livingston’s position was calculated to reward the person whose labor has brought the property into the stream of commerce.

Justice Livingston raised a further issue. Why, he queried, did the case come to the courts; would it not have been better to have referred the controversy to a cabal of sportsmen, who, he mused, would know precisely to whom the pelt should be awarded? There is a certain prescience to his comment; it surely has a modern ring. Avoid litigation; submit the dispute to ADR (alternative dispute resolution); arbitrate, mediate, or negotiate. And note that his preferred decision-makers are gendered sportsmen. The

evaluations of huntswomen are not welcomed here; modern feminist jurisprudence scholars would remind us that the prevailing legal order sought (consciously or otherwise) to create a law made by men to protect the interests of men.

The majority valued something else. Justice Tompkins wrote that rules ought to be made in such a way that they are easily enforced. Modern legal academics call such rules “administratively efficient.” If the rule of the dissent had been adopted, that pursuit with a reasonable chance of physical appropriation would accord property rights in the animal to the huntsman, how would a person know when his or her chase was sufficiently far enough along to be certain that property rights would be allocated to him or her? And how could an interloper like Pierson know when the chase was too far along for him to intercede? The standard of “depriving the wild animal of its natural liberty” is a bright-line rule. It is easy to apply, it is “administratively efficient.”

Of course, there was a moral dimension to the case. Did not Pierson’s conduct run counter to prevailing ideas of morality? Wasn’t he really a thief? American law is also comprised of a philosophy that incorporates societal as well as economic values. So both legal theory and jurisprudence are a staple of American legal reasoning and the American legal education.

Old Wine in New Bottles – of Baseballs and Foxes

Why bother to read old cases? Because modern decisions are woven from them. The logic of past cases may direct controversies that subsequently come before the court. Old wine in new bottles. The discourse which follows is an interesting and amusing example of how a modern court “plays” with precedent.

On October 7, 201, Barry Bonds hit his record-setting 73rd home run of the 2001 Major League Baseball season. You may be asking yourself: “How could a baseball possibly be related to a fox?” Allow me to explain. During the lead-up to the game, it was widely anticipated that if Barry Bonds did indeed hit a new record-setting home run, the ball could be worth over \$1 million. As you can imagine, the prospect of catching this baseball brought many fans into the stadium that day. Alex Popov being one of them: Patrick Hayashi being another. Well, Barry Bonds did hit that record-setting home run, and the ball soared through the sky and landed directly into Popov’s glove. However, as the ball entered his glove, he was immediately attacked by a large group of fans also trying to obtain the flying fortune. This caused Popov to drop the ball, allowing it to roll into the hands of Hayashi, who had also been knocked down by the group. Popov, believing himself to be the rightful owner of baseball, decided to sue Hayashi for conversion, essentially demanding the return of the baseball or its value. Sound familiar?

The court was once again tasked with deciding at what point possession and ownership are obtained. To that end, the court began by identifying some fundamental principles of possession. The court looked at the perspectives of various legal professors with expertise in the area. Hayashi, following the argument of Professor Gray, suggested that in order to establish possession, “the actor must regain control of the ball after incidental contact with people and things.” Popov retorted, citing the logic of Professors Finkelman and Bernhardt, that possession occurs “by stopping the forward momentum of the ball whether or not complete control is achieved.” In other words, possession occurs when the ball is “wounded, circumvented or ensnared . . . so as to deprive [it] of [its] natural liberty.” In fact, Popov specifically pointed the attention of the court towards *Pierson v. Post* in order to support his contention.

However, the court disagreed with Popov and adopted the conception of possession proffered by Professor Gray (Gray’s Rule). They reasoned that the principles argued by Popov, that possession is obtained even before absolute dominion and control, were in response to the unique circumstances of the conduct they attempt to regulate. That the reason they are relevant in those contexts (capturing a

harpooned whale, fleeing fox, or sunken ship) is because absolute dominion and control is impossible. Such is not the case of a baseball hit into the stadium stands. So, Popov loses, right? Not quite.

The inquiry did not stop there. Now that the court had decided on their definition of possession, it was time to apply it. Gray's Rule, as stated earlier, was that "the actor must retain control of the ball after incidental contact with people and things." Popov lost control of the ball. It was once again "wild" and subject to capture by another. However, his loss of control of the ball was not due to incidental contact; it was the result of a collective assault. The court then reasoned that Popov should have had the opportunity to complete his catch unimpeded, "to hold otherwise would be to allow the result, in this case, to be dictated by violence. That will not happen." The court, as a matter of equity and fundamental fairness, adopted a new rule which bestowed upon Popov a pre-possessory interest in the ball which constituted a qualified right to possession. So, Popov wins? Not necessarily.

While Popov had a pre-possessory interest in the ball, Hayashi had initially attained unequivocal dominion and control. Hayashi was not a wrongdoer and was also a victim of the violent group. Both Popov and Hayashi had a legitimate possessory interest in the ball unencumbered by the other. So, the court, relying on the concept of equitable division, did the only thing that seemed "fair." They declared that both parties had an equal and undivided interest in the ball and that the ball must be sold, with the proceeds divided equally between them.

While *Pierson v. Post* took place almost 200 years before *Popov v. Hayashi*, the process that transpired in the court and the principles relied upon are fundamentally the same. In both cases, the court looked for guiding legal principles from learned experts, considered the righteousness of each party's actions, and inquired into the policy effects their respective decisions would have. Although the Popov court did not follow the principles relied on by the Post court, they only did so after distinguishing their unique set of facts and context. The Popov court had the advantage of knowing the reasoning used by the Post court, leading them to a decision which uniquely addressed the issue at hand. Every relevant court decision will help guide the next court in reasoning their way to resolving the case before them.

Conclusion

All these issues clash in many cases that have come before American courts and continue to grace the halls of justice. But of course, not all cases are decided by recourse to *Barbeyrac*, or even the various strands of logic that support the common law. Today most cases allocating rights in property probably would be decided by statute. Much common law has been reduced to legislation, and they are drafted with reasonable specificity, though perhaps not quite like a code. But statutory interpretation also can be influenced by the sort of policy concerns that were in play in *Pierson v. Post*. Legislatures ponder some of the same issues in drafting laws. These multifarious concerns render the study of American law a very complicated but very interesting intellectual exercise.

[15] Here, none of the exceptions applies. First, Illinois has adopted a “rule of tolling,” which provides that if an action “is dismissed by a United States District Court for lack of jurisdiction, * * * then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff * * * may commence a new action [in state court] within one year or within the remaining period of limitation, whichever is greater, after * * * the action is dismissed by a United States District Court for lack of jurisdiction.” 735 ILCS 5/13-217; see also *Davis*, 534 F.3d at 654; *White v. City of Chicago*, 149 F.Supp.3d 974, 983–84 (N.D. Ill. 2016). Second, this Court has not yet committed “substantial judicial resources” to considering the merits of Plaintiff’s state law claims. See *Davis*, 534 F.3d at 654 (“the district court disposed of the federal claims on summary judgment, and so ‘substantial judicial resources’ have not yet been committed to the case”). Third, it is not clearly apparent how the state law claims would be decided. In these circumstances, the usual rule applies and dictates dismissal without prejudice of Plaintiff’s state law claims in Count I, II, and VII.

IV. Conclusion

For the reasons stated above, the Court grants Defendant’s motion for summary judgment [111] and denies Plaintiff’s cross-motion for summary judgment [129] as to Plaintiff’s federal claims in Count I (ADEA discrimination), Count II (ADA discrimination), Count III (Rehabilitation Act violation), and Count IV (FMLA interference). Plaintiff’s remaining state law claims in Counts I, II and VII are dismissed without prejudice. The Court will enter a final judgment and close the case.



Donald and Jodi GUTTERMAN, Individually and as Parents and Next Friends of Madison Gutterman, Plaintiffs,

v.

**TARGET CORPORATION and
Bravo Sports, Defendants.**

15 C 5714

United States District Court,
N.D. Illinois, Eastern Division.

Signed 03/17/2017

Background: Minor customer brought negligence and products liability action against retail store and skateboard manufacturer, seeking to recover for injuries sustained when she fell off of skateboard she was riding in store. Defendants moved for summary judgment.

Holdings: The District Court, John Z. Lee, J., held that:

- (1) riding a skateboard in retail store presented an open and obvious danger, and thus store was not liable for negligence;
- (2) skateboard manufacturer did not owe duty of care to minor customer, and thus was not liable for negligent design;
- (3) skateboard’s box packaging did not render it unreasonably dangerous, for purposes of strict products liability claim; and
- (4) plastic shrink wrap covering skateboard did not render it unreasonably dangerous, for purposes of strict products liability claim.

Motions granted.

1. Negligence ⇌ 1022

Products Liability ⇌ 124, 264

Riding skateboard in retail store presented an open and obvious danger to a

reasonable 12-year-old in minor customer's position, such that injury was not reasonably foreseeable to store, precluding imposition of negligence liability under Illinois law in personal injury action brought by customer after she fell off skateboard while riding it in store; reasonable 12-year-old would have recognized that skateboard was a precarious device that rolled on wheels and invited the user to fall, and store could reasonably have expected customer to avoid the open and obvious danger presented by the skateboard, making it likely that customer would avoid injury.

2. Negligence ⇌202

To succeed on a claim of negligence under Illinois law, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach.

3. Negligence ⇌1692

Under Illinois law, the existence of a duty is a question of law.

4. Negligence ⇌214

In determining the existence of a duty, Illinois courts ask whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff.

5. Negligence ⇌210, 213

Four factors are relevant to analysis of duty under Illinois law: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant.

6. Negligence ⇌212, 1012

Under Illinois law, the "open and obvious rule" is a common law construct that mitigates a party's duty to protect another from a potentially dangerous, yet open and

obvious, condition in both negligence and premises liability actions.

See publication Words and Phrases for other judicial constructions and definitions.

7. Negligence ⇌1706

Under Illinois law, whether a dangerous condition is open and obvious may present a question of fact, but if there is no dispute as to the physical nature of a condition, whether it is open or obvious is a question of law.

8. Negligence ⇌1012

Under Illinois law, a finding that a condition is open and obvious does not of itself preclude the existence of a duty.

9. Negligence ⇌1012, 1014

In carrying out a traditional duty analysis under Illinois law, courts use the open and obvious rule in evaluating the first two factors of the duty inquiry: the foreseeability and likelihood of injury.

10. Negligence ⇌1014

Under Illinois law, in regard to foreseeability, the open and obvious nature of a condition reduces the reasonable foreseeability of injury, because it is reasonable for a defendant to expect that a plaintiff will avoid an open and obvious danger.

11. Products Liability ⇌127, 150, 264

Under Illinois law, purported design defect in skateboard packaging, namely, that skateboard's packaging could be easily removed and skateboard used in store, was open and obvious dangerous condition, and thus skateboard manufacturer did not owe duty of care to minor customer who was injured when she fell off of skateboard that she was riding in retail store; injury resulting from purported defect was not reasonably foreseeable because it was reasonable for manufacturer to expect that customer would not ride skateboard in store.

12. Products Liability ⇌127

Under Illinois law, a plaintiff can bring a claim that a product is defectively designed through causes of action in both negligence and strict products liability.

13. Products Liability ⇌113, 114

Under Illinois law, a negligence-based theory of products liability focuses on the defendant's conduct, whereas a strict products liability-based theory focuses on the product at issue.

14. Products Liability ⇌127

Under Illinois law, the crucial question in a negligent-design products liability case is whether the manufacturer exercised reasonable care in the design of the product.

15. Products Liability ⇌127

Under Illinois products liability law, whether the danger presented by a purported design defect is open and obvious bears on whether the defendant owes a duty to the plaintiff.

16. Products Liability ⇌127

Under Illinois law, to prove a strict products liability claim based on a design defect, a plaintiff must demonstrate that the product's design renders it unreasonably dangerous.

17. Products Liability ⇌130

Under Illinois law, the "consumer-expectation test" to determine whether a product is unreasonably dangerous under design defect theory asks whether a product failed to perform as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, and requires that a plaintiff establish what an ordinary consumer purchasing the product would expect about the product and its safety.

See publication Words and Phrases for other judicial constructions and definitions.

18. Products Liability ⇌406

Under Illinois products liability law, application of the consumer-expectation test to determine whether a product is unreasonably dangerous under design defect theory is typically a task for the jury, but it can be decided as a matter of law where no reasonable jury could find that a product performed other than how an ordinary consumer would expect.

19. Products Liability ⇌129

Under Illinois products liability law, the "risk-utility test" to determine whether a product is unreasonably dangerous requires that a plaintiff demonstrate that the magnitude of the danger outweighs the utility of the product, as designed.

See publication Words and Phrases for other judicial constructions and definitions.

20. Products Liability ⇌129

In weighing risk versus utility in a products liability action, Illinois courts look to a wide variety of factors, which include the magnitude and probability of the foreseeable risks of harm; the instructions and warnings accompanying the product; the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing; the likely effects of any alternative designs on production costs; and conformity with industry standards, voluntary organization guidelines, and government regulation.

21. Products Liability ⇌129

Under Illinois law, where the consumer-expectation and risk-utility tests produce different results in a products liability action, the risk-utility test prevails.

22. Products Liability ⇌130, 264

Under Illinois law, skateboard's box packaging functioned as ordinary consumer would expect and did not render skateboard unreasonably dangerous, and thus

skateboard manufacturer was not liable on claim for strict products liability based on design defect brought by minor customer of retail store who was injured when she fell off of skateboard that she was riding in store; although customer asserted that packaging was too easily removed, permitting individuals to take it off and ride the skateboard, skateboard was equipped with a warning that cautioned against use without proper protective wear.

23. Products Liability *↔* 129, 151, 264

Plastic shrink wrap on surface of skateboard which covered skateboard's grip tape did not render skateboard unreasonably dangerous, and thus manufacturer of skateboard was not liable under Illinois law on claim for strict products liability based on design defect brought by minor customer of retail store who was injured when she fell off of skateboard that she was riding in store, where it was not reasonably foreseeable that an ordinary skateboard user would use skateboard in a store without removing obvious packaging or purchasing it, and utility of protecting skateboard's appearance for sale outweighed need to eliminate the open and obvious risk presented by riding skateboard with the plastic wrap on.

Kenneth C. Apicella, Drost, Gilbert, Andrew & Apicella, LLC, Palatine, IL, for Plaintiffs.

Jodi Gutterman, pro se.

Robert Michael Burke, Helena Maria Jorgensen, Michael Joseph Linneman, Johnson & Bell, Ltd., Donald J. O'Meara, Jr., Pretzel & Stouffer, Chtd., Chicago, IL, for Defendants.

1. The following facts are undisputed except where noted. The parties' statements of facts and responses regarding the two separate motions are largely duplicative. Thus, for ease of

MEMORANDUM OPINION AND ORDER

John Z. Lee, United States District
Judge

This case arises from injuries that Madison Gutterman ("Madison") suffered while riding a skateboard within a Target store in Vernon Hills, Illinois. Her parents, Donald and Jodi Gutterman ("Plaintiffs"), brought suit on her behalf against Target and Bravo Sports ("Bravo"), which manufactured and distributed the skateboard at issue. Target and Bravo have separately moved for summary judgment. For the reasons that follow, both motions [61] [73] are granted.

Background¹

On May 26, 2013, Donald, Jodi, and Madison visited Target's store in Vernon Hills. Target's LR 56.1(a)(3) Stmt. ¶ 10, ECF No. 62. Madison, age eleven, was one month away from her twelfth birthday. *Id.* ¶ 14. While they were shopping, Madison asked Donald and Jodi if she could go off by herself to a different section of the store, and Donald and Jodi agreed. *Id.* ¶¶ 15–16.

Madison went to a section of the store where skateboards were on display. *Id.* ¶ 24. She took a skateboard off the shelf, placed it on the floor, and rode it down an aisle. *Id.* ¶ 27. The aisle was clean, clear, and dry, and there were no obstructions on the floor. *Id.* ¶ 29. Despite this, the parties agree that the floor was hard, slick, and unfit for skateboarding. *See* Pls.' LR 56.1(b)(3)(C) Stmt. (Target) ¶ 76, ECF No. 89. After riding the skateboard for a short period of time, Madison fell off and sustained injuries that spurred the action be-

understanding, the Court primarily cites the statements and responses dealing with Target's motion.

fore this Court. Target's LR 56.1(a)(3) Stmt. ¶¶ 21–22.

The skateboard at issue was manufactured and distributed to Target by Bravo. Pls.' LR 56.1(b)(3)(C) Stmt. (Target) ¶ 72. Bravo placed "deterrent devices" on all skateboards it distributed to Target, including those that arrived at the Vernon Hills store prior to May 26, 2013. *Id.* ¶¶ 73, 75. "Truck boxes" are the only deterrent device Bravo used with the type of skateboard at issue. *Id.* ¶ 75. A truck box is "a cardboard box that covers the rear axle and wheels of the skateboard." Target's LR 56.1(a)(3) Stmt. ¶ 39. The box is affixed to the skateboard with hot glue or packaging tape. *Id.* ¶ 41. It can be removed quickly and easily by simply pulling it off. *Id.* ¶ 42. The purpose of the box is twofold: to protect the skateboard from damage pre-sale, and to protect customers by deterring them from riding skateboards in stores. *See id.* ¶ 40. Here, however, the parties agree that no truck box was affixed to the skateboard at issue when Madison rode it and that the truck box thus must have

been removed at some point prior. *Id.* ¶ 55; Pls.' LR 56.1(b)(3)(C) Stmt. (Bravo) ¶ 57, ECF No. 91.²

Additionally, at the time Madison rode the skateboard, its surface was covered in plainly visible plastic shrink wrap meant to protect the board's surface during manufacturing and distribution. Target's LR 56.1(a)(3) Stmt. ¶¶ 43, 45; *id.*, Ex. G, ECF No. 62–8. The plastic wrap covers "grip tape" that provides traction on the board's surface; thus, the board is unsuitable for riding before the wrap is removed. *Id.* ¶ 45. The parties agree that the fact that the board's surface remained wrapped contributed to Madison's fall. Pls.' LR 56.1(b)(3)(C) Stmt. (Target) ¶ 76. Bravo placed a warning sticker on top of the plastic wrap that reads as follows: "WARNING! Reduce the risk of serious injury and only use this skateboard while wearing full protective gear—Helmet, Knee Pads, Elbow Pads, Wrist Guards, and Flat Soled Shoes[.] Max Rider Weight 110 lbs[.]" Target's LR 56.1(a)(3) Stmt. ¶¶ 46–47, 49.³ Madison wore flip flops, and

2. Plaintiffs at times take the position that the skateboard at issue was not shipped with a deterrent device. *E.g.*, Pls.' Resp. Opp'n Bravo's Mot. Summ. J. 6, ECF No. 90. But this position is belied by Plaintiffs' own statement of facts, which asserts that "Bravo placed deterrent devices on all of the skateboards it distributed to massmarket retailers such as Target," Pls.' LR 56.1(b)(3)(C) Stmt. (Bravo) ¶ 40, and that prior to the date of the incident, "skateboards arrived at the Vernon Hills store from the distribution center with deterrent devices attached." *Id.* ¶ 42. Moreover, Plaintiffs advance nothing more than speculation that the skateboard at issue was distributed without a truck box, which is insufficient to create a genuine issue of fact on summary judgment. *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007). It is irrelevant whether the type of skateboard at issue did not have a design specification for a deterrent device, Pls.' LR 56.1(b)(3)(C) Stmt. (Bravo) ¶ 58, because it is undisputed that Bravo distributed the type of skateboard at issue with a

truck box. Additionally, testimony from a store employee that she "did not recall ever seeing a skateboard for sale at Target with its wheels boxed in," *id.* ¶ 76, may indicate truck boxes were frequently removed, but such testimony is not evidence from which a reasonable juror could conclude Bravo failed to deliver the skateboard at issue with a truck box attached.

3. Plaintiffs (at least in regard to Target's motion) seem to dispute the fact that the warning sticker was attached to the skateboard when Madison took it off the shelf, pointing out that Madison's testimony does not establish that it was affixed. Pls.' LR 56.1(b)(3)(B) Stmt. (Target) ¶ 49, ECF No. 89. But they agree in the next paragraph that the skateboard was in the condition depicted in Target's photograph of the skateboard at issue, which clearly displays the sticker affixed to the board. *Id.* ¶ 50; Target's LR 56.1(a)(3) Stmt., Ex. G. (In response to Bravo's motion, they simply admit the warning sticker was attached. Pls.' LR

no other protective gear, while riding the board. *See id.* ¶¶ 13, 28. The parties dispute whether wearing flip flops contributed to Madison's injury and what impact wearing protective gear would have had. Target's Resp. Pls.' LR 56.1(b)(3)(C) Stmt. ¶ 76, ECF No. 96.

Madison had experience riding skateboards; "she knew how to ride the skateboard she took off the shelf in the store that day, and there was nothing new, different, or unusual about this skateboard as compared to other skateboards she had previously ridden." Target's LR 56.1(a)(3) Stmt. ¶ 30. At a more basic level, she knew "that a skateboard has wheels, that it rolls on those wheels, that she could fall off of it, and that if she were to fall off of it, she could get hurt." *Id.* ¶ 33. Moreover, while the parties dispute the precise guidance Donald and Jodi had given her about using skateboards in a store, riding with flip flops, and riding without protective gear, there is no dispute that they generally advised her against these activities. Target's LR 56.1(a)(3) Stmt. ¶¶ 17–18; *id.*, Ex. B, at 38:20–40:1, ECF No. 62–3; *id.*, Ex. C, at 20:17–21:7, 25:2–14, ECF No. 62–4; Bravo's LR 56.1(a)(3) Stmt. ¶¶ 13–15, ECF No. 75; Target's Resp. Pls.' LR 56.1(b)(3)(C) Stmt. ¶ 110.

Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Shell v. Smith*, 789 F.3d 715, 717 (7th Cir. 2015). To survive summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts," *Matsu-*

56.1(b)(3)(B) Stmt. (Bravo) ¶ 38, ECF No. 91.) Thus, even though Madison did not testify that the sticker was affixed or that she read it, Plaintiffs do not raise a genuine dispute about whether the skateboard at issue had a warn-

shita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and instead must "establish some genuine issue for trial such that a reasonable jury could return a verdict in her favor." *Gordon v. FedEx Freight, Inc.*, 674 F.3d 769, 772–73 (7th Cir. 2012). In reviewing a motion for summary judgment, courts "must construe all facts and reasonable inferences in favor of the nonmoving party." *Dorsey*, 507 F.3d at 627. But "[i]nferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Id.* (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004)) (internal quotation marks omitted).

Analysis

I. Claims Against Target

[1] Plaintiffs first seek to recover against Target on theories of common law negligence and violation of the Illinois Premises Liability Act. Target has moved for summary judgment on the grounds that the skateboard by which Madison suffered her injuries was an open and obvious danger, and that Target owed Madison no duty of care.

[2, 3] In this diversity action, the Court applies Illinois law. *Lane v. Hardee's Food Sys., Inc.*, 184 F.3d 705, 707 (7th Cir. 1999). To succeed in a claim of negligence, "the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach." *Bruns v. City of Centralia*, 386 Ill.Dec. 765, 21 N.E.3d 684, 688–89 (2014). The existence of a duty is a question of law. *Id.*, 386 Ill.Dec. 765, 21 N.E.3d at 689.

ing sticker. In any case, Madison's testimony states that she did not recall reading the sticker, not that it was not affixed to the skateboard. Target's LR 56.1(a)(3) Stmt., Ex. D, at 19:13–16, ECF No. 62–5.

[4, 5] In determining the existence of a duty, Illinois courts ask “whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff.” *Bruns*, 386 Ill.Dec. 765, 21 N.E.3d at 689 (quoting *Ward v. K Mart Corp.*, 136 Ill.2d 132, 143 Ill.Dec. 288, 554 N.E.2d 223, 227 (1990)). Four factors are relevant to this analysis: “(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant.” *Id.*

[6, 7] The “open and obvious rule” is a common law construct that mitigates a party’s duty to protect another from a potentially dangerous, yet open and obvious, condition. *Id.* The open and obvious rule applies in both negligence and premises liability actions. *Id.*, 386 Ill.Dec. 765, 21 N.E.3d at 689–90; *Ward*, 143 Ill.Dec. 288, 554 N.E.2d at 229–30. “‘Obvious’ means that ‘both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.’” *Bruns*, 386 Ill.Dec. 765, 21 N.E.3d at 690 (quoting Restatement (Second) of Torts § 343A cmt. b (1965)). “Whether a dangerous condition is open and obvious may present a question of fact,” but if there is no dispute as to the “physical nature” of a condition, as is the case here, whether it is open or obvious is a question of law. *Id.*⁴

4. Plaintiffs’ citation to *Qureshi v. Ahmed*, 394 Ill.App.3d 883, 334 Ill.Dec. 265, 916 N.E.2d 1153 (2009), for the proposition that the issue of whether a dangerous condition is open and obvious is typically a question of fact, Pls.’ Resp. Opp’n Target’s Mot. Summ. J. 8, ECF No. 88 (citing *Qureshi*, 334 Ill.Dec. 265, 916 N.E.2d at 1158), misstates the law. The case

[8–10] Importantly, a finding that a condition is open and obvious does not of itself preclude the existence of a duty. *Bruns*, 386 Ill.Dec. 765, 21 N.E.3d at 690. Rather, in carrying out a traditional duty analysis, courts use the open and obvious rule in evaluating the first two factors of the duty inquiry: the foreseeability and likelihood of injury. *Id.* In regard to foreseeability, the open and obvious nature of a condition reduces the reasonable foreseeability of injury, because it is reasonable for a defendant to expect that a plaintiff will avoid an open and obvious danger. *Id.*, 386 Ill.Dec. 765, 21 N.E.3d at 694. Similarly, the likelihood that a plaintiff will avoid an open and obvious danger reduces the likelihood of injury under the second factor. *Id.*, 386 Ill.Dec. 765, 21 N.E.3d at 695. After incorporating the open and obvious rule in this manner, courts proceed as usual to consider the magnitude and consequences of placing a burden on the defendant. *Id.*

The open and obvious rule applies just the same when children are involved. *Corcoran v. Vill. of Libertyville*, 73 Ill.2d 316, 22 Ill.Dec. 701, 383 N.E.2d 177, 180 (1978) (stating that “[e]ven if an owner or occupier knows that children frequent his premises, he is not required to protect against the ever-present possibility that children will injure themselves on obvious or common conditions”). As the Supreme Court of Illinois has explained, “[i]t is always unfortunate when a child gets injured while playing, but a person who is merely in possession and control of the property cannot be required to indemnify against every

is an Illinois appellate court decision that precedes *Bruns*. In any event, *Qureshi* involved disputed facts as to the nature of the product at issue (there, a treadmill) and the danger it presented, 334 Ill.Dec. 265, 916 N.E.2d at 1159, whereas here, the parties do not dispute the skateboard’s physical qualities or the danger it presented.

possibility of injury thereon. The responsibility for a child's safety lies primarily with its parents, whose duty it is to see that his behavior does not involve danger to himself." *Id.* (quoting *Driscoll v. Rasmussen Corp.*, 35 Ill.2d 74, 219 N.E.2d 483, 486 (1966)). To that end, "[t]here are many dangers, such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be understood and appreciated by any child of an age to be allowed at large." *Id.* (quoting Restatement (Second) of Torts § 339 cmt. j (1965)). And "a possessor of land is free to rely upon the assumption that any child old enough to be allowed at large by his parents will appreciate certain obvious dangers or at least make his own intelligent and responsible choice concerning them." *Mount Zion State Bank & Trust v. Consol. Comm'ns, Inc.*, 169 Ill.2d 110, 214 Ill.Dec. 156, 660 N.E.2d 863, 868 (1995).

Illinois courts have had various opportunities to determine whether particular conditions are analogous to fire, water, and heights such that they are openly and obviously dangerous. While no Illinois court (or, by the Court's research, any court) has reached the issue of whether riding a skateboard in circumstances similar to this case constitutes an openly and obviously dangerous condition, two applications of the open and obvious rule provide some guidance. The first involves recreational trampolines, which Illinois courts have invariably determined are an openly and obviously dangerous condition when children jump on them. *Qureshi*, 334 Ill.Dec. 265, 916 N.E.2d at 1158 (collecting cases). The cases highlight the risk of falling from a height that trampolines present. *Id.* Similarly, Illinois courts also recognize that "even a child is expected to comprehend the danger of falling from a slide." *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470, 474 (7th Cir. 1991) (citing *Alop by Alop v. Edgewood Valley Cmty. Ass'n*,

154 Ill.App.3d 482, 107 Ill.Dec. 355, 507 N.E.2d 19, 21-23 (1987)); see *Young by Young v. Chi. Hous. Auth.*, 162 Ill.App.3d 53, 113 Ill.Dec. 794, 515 N.E.2d 779, 782 (1987) ("A 5-year-old child knows that if he or she falls from a height onto concrete while, e.g., playing on monkey bars, he or she probably will get hurt."); see also *Wreglesworth ex rel. Wreglesworth v. Arctico, Inc.*, 317 Ill.App.3d 628, 251 Ill.Dec. 363, 740 N.E.2d 444, 451 (2000) (concluding that colliding with a pier presented an open and obvious danger to a minor riding a jet ski).

Here, riding a skateboard in a Target store presents an open and obvious danger little different from the facts in the above cases. A reasonable near-twelve-year-old in Madison's position would recognize, just as Madison admittedly did, that a skateboard is a precarious device that rolls on wheels and invites the user to fall. Target's Rule 56.1(a)(3) Stmt. ¶¶ 30, 33; see *Williams v. Toys "R" Us*, 138 Fed.Appx. 798, 801 (6th Cir. 2005) (internal citation omitted) ("A skateboard is an object of considerable size. These devices are ubiquitous, and their propensity to roll easily under the weight of a human body is patent.' . . . [A]n ordinary person would be aware that stepping onto [a] skateboard could cause that person to slip and fall."). The height of such a fall may be less than that from a trampoline, but the speed of a skateboard's movement presents its own, additional hazard. Thus, there is no reason why jumping on a trampoline or using playground equipment can constitute an openly and obviously dangerous condition, while using a skateboard would not.

The particular circumstances of this case only buttress this conclusion. Madison rode the skateboard while wearing flip flops, Pls.' LR 56.1(b)(3)(C) Stmt. (Target) ¶ 44, which a reasonable near-twelve-year-old would know provide inferior support while

playing or engaging in athletic activity. Madison's parents told her as much. Target's LR 56.1(a)(3) Stmt. ¶ 17; *id.*, Ex. B, at 38:20–40:1; *id.*, Ex. C, at 20:17–21:7, 25:2–14; Target's Resp. Pls.' LR 56.1(b)(3)(C) Stmt. ¶ 110. Additionally, the skateboard was still wrapped in clearly visible plastic packaging that covered the skateboard's grip tape and made the skateboard's surface slippery. Target's LR 56.1(a)(3) Stmt. ¶ 44; *id.*, Ex. G. A reasonable near-twelve-year-old familiar with skateboards, as Madison was, *id.* ¶¶ 30, 33, would know that riding a skateboard with plastic wrap covering its surface would only increase the risks already present. Reasonably prudent judgment would influence not only refraining from using the skateboard in the store, but at the very least, removing the plastic wrap. Furthermore, a reasonable near-twelve-year old with experience riding skateboards would know that a hard, slick retail store floor, Pls.' LR 56.1(b)(3)(C) Stmt. (Target) ¶ 76, is a particularly precarious surface on which to ride a skateboard. Finally, a warning sticker was attached to the skateboard that noted the serious risk of injury and advised proper equipment to use when skateboarding.⁵ Target's LR 56.1(a)(3) Stmt. ¶¶ 46–47, 49. A reasonable near-twelve-year-old would be able to read and

understand the warning and appreciate the consequences of ignoring it.

For the foregoing reasons, the Court concludes that the dangers presented by riding the skateboard in the circumstances that existed here would be open and obvious to a reasonable near-twelve-year-old in Madison's position at the time of the accident.⁶ As such, Madison's injury was not reasonably foreseeable to Target, because it could reasonably have expected Madison to avoid the open and obvious danger presented by the skateboard. Similarly, because the open and obvious nature of the danger presented by the skateboard made it likely Madison would avoid any injury, Madison's injury was not likely to occur.

This leaves only the magnitude of the burden that placing a duty on Target in this case would create and the consequences of imposing such a burden. The magnitude of a burden reflects financial considerations relative to the specific condition at issue, whereas the consequences of a burden reflect broader, systemic concerns. *See Bruns*, 386 Ill.Dec. 765, 21 N.E.3d at 695; *Bucheleres v. Chi. Park Dist.*, 171 Ill.2d 435, 216 Ill.Dec. 568, 665 N.E.2d 826, 836–37 (1996). Here, requiring Target to prevent accidents like this from happening would likely entail significant

5. Plaintiffs argue that there is question of fact about whether flip flops constitute flat-soled shoes—which the skateboard's warning stated should be used when riding—and whether a reasonable near-twelve-year-old would believe as much. Pls.' Resp. (Target) at 10. This argument misses the mark in two respects. First, it misunderstands the nature of the open and obvious inquiry, which is generally for the court to conduct unless there is a dispute about the physical quality of the condition at issue. Second, even if flip flops are not flat-soled shoes, the warning sticker cautioned that riding a skateboard can cause serious injury and went on to list several more items of protective gear that should be worn, all of which point to the open and obvious danger of the condition in this case.

6. This analysis demonstrates how *Cruzen ex rel. Cruzen v. Sports Authority*, 369 F.Supp.2d 1003 (S.D. Ill. 2005), is inapposite. There, the court declined to conclude as a matter of law that an unsecured pogo stick left out in the front of a sporting goods store was an openly and obviously dangerous condition from the perspective of a fifteen-year-old that injured himself using the stick. *Id.* at 1007. Unlike here, the pogo stick had been removed from a box that displayed various warnings, including a weight limit exceeded by the plaintiff. *Id.* at 1004, 1007. This characteristic was not obvious from the stick itself. *Id.* at 1007. Additionally, the defendants misunderstood the scope of the open and obvious rule, precluding the court from concluding that a duty was not owed. *See id.* at 1006.

cost. Target would need to assign personnel to ensure at frequent intervals that deterrent devices remained attached to skateboards and regularly monitor the areas in which skateboards were kept to prevent them from being ridden in its stores. These costs are unjustified given the open and obvious danger that riding a skateboard in these circumstances presents. The consequences of such a burden could be even broader, as Target's inability to adequately police skateboard displays could require it to completely alter the manner in which it sells skateboards. Additionally, imposing a burden in this case might serve as a basis for imposing similar burdens regarding any manner of items in a Target store that could cause harm if used improperly by customers while browsing. Cf. *Blackford v. Wal-Mart Stores, Inc.*, No. CIV. 07-437-GPM, 2008 WL 905912, at *2 (S.D. Ill. Apr. 2, 2008) (remarking, in a related context, that "[f]or a landowner such as [Target], the cost of securing the entire store is simply too high to offset the small chance that parent-supervised children will find a way to injure themselves").

On balance, the Court concludes that these factors weigh in favor of not imposing a duty of care upon Target in this case. Thus, Plaintiffs cannot make out their *prima facie* case under their theories of negligence or premises liability, and summary judgment for Target is granted.⁷

II. Claims Against Bravo

A. Negligent Design

[11] As against Bravo, Plaintiffs seek to recover under theories of negligence and strict products liability. In support of their negligence theory, Plaintiffs assert that the skateboard was defectively de-

signed because Bravo should have equipped it with a better deterrent device. Pls.' Resp. (Bravo) at 5. Their theory appears to be that, because the truck box on Bravo's skateboards can be so easily removed, Bravo's skateboards can be too easily ridden in retail stores, making them unreasonably dangerous.

[12–14] Under Illinois law, a plaintiff can bring a claim that a product is defectively designed through causes of action in both negligence and strict products liability. *Blue v. Envtl. Eng'g, Inc.*, 215 Ill.2d 78, 293 Ill.Dec. 630, 828 N.E.2d 1128, 1141 (2005) (plurality opinion). A negligence-based theory focuses on the defendant's conduct, whereas a strict products liability-based theory focuses on the product at issue. *Id.* To prove a product is defectively designed under a negligence theory, the same common law framework applies as outside the products liability context. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 309 Ill.Dec. 383, 864 N.E.2d 249, 270 (2007). Thus, a plaintiff must prove that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff's injury; and (4) the plaintiff suffered damages. *Id.* (citing *Ward*, 143 Ill.Dec. 288, 554 N.E.2d at 226). Moreover, "[t]he crucial question in a negligent-design case is whether the manufacturer exercised reasonable care in the design of the product." *Id.*

[15] Bravo, like Target, argues that it is entitled to summary judgment on Plaintiffs' negligence claim because of the open and obvious rule. In defective design claims premised on negligence, the open and obvious rule applies in much the same fashion as described above. Just as with a

7. Because the Court grants summary judgment on this basis, it need not consider Target's additional arguments that Madison impliedly assumed the risk of the injuries she

suffered, or that Target had no actual or constructive notice of the dangerous condition presented by the skateboard.

premises liability-based claim, whether the danger presented by a purported design defect is open and obvious bears on whether the defendant owes a duty to the plaintiff. *Blue*, 293 Ill.Dec. 630, 828 N.E.2d at 1145–46. As before, this is a question of law for the Court to decide. *Id.*

Here, the danger presented by the skateboard's purported design defect—that the truck box could be removed and the skateboard used in a store—appears to be no different than the danger presented by the skateboard itself. Accordingly, for the same reasons as discussed above, the Court concludes that the skateboard's purported design defect presents an openly and obviously dangerous condition. On that basis, Madison's injury resulting from the purported defect was not reasonably foreseeable, because it was reasonable for Bravo to expect that she would not have ridden the skateboard in the Target store. Similarly, because the open and obvious nature of the danger made it likely Madison would avoid the injuries she suffered, her injuries were not likely to occur for the purposes of this analysis.

Moreover, the magnitude of the burden and consequences of imposing a burden on Bravo in this case would be significant. Bravo would not only have to conduct research to determine an appropriate deterrent device that is impenetrable within a retail store, but would have to outfit all of its skateboards with that device, no doubt at great expense. Granted, Bravo has other deterrent devices at its disposal, but Plaintiffs have not indicated that substituting one of these devices would remedy incidents like that involving Madison in a cost-effective manner. In addition to implementing a new deterrent device, Bravo would then need to monitor the effectiveness of its device in retail stores across the country to guard against its circumvention. This imposition is unjustifiable given the

open and obvious danger of riding a skateboard in a retail store.

For these reasons, the Court finds that Bravo did not owe Madison a duty of care and therefore grants Bravo summary judgment on Plaintiffs' negligent-design claim.

B. Strict Products Liability

Plaintiffs' strict products liability claim is premised on the notion that (1) Bravo failed to warn of the danger its use presented, and (2) the skateboard at issue had two design defects: an inadequate deterrent device and plastic wrapping. Pls.' Resp. (Bravo) at 9–10.

Little need be said about Plaintiffs' failure to warn theory. To succeed under a failure to warn theory, Plaintiffs would need to show that Bravo's skateboard “possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm,” and that Bravo, “possessed of such knowledge, knows or should know that harm may occur absent a warning.” *Sollami v. Eaton*, 201 Ill.2d 1, 265 Ill.Dec. 177, 772 N.E.2d 215, 219 (2002). The problem facing Plaintiffs in making this showing, however, is that “[n]o duty to warn exists where the danger is apparent or open and obvious.” *Id.* And as explained above, the risks presented by Bravo's skateboard were open and obvious. Plaintiffs' failure to warn theory therefore fails.

[16–18] Plaintiffs' design defect theory requires lengthier consideration. To prove a strict products liability claim based on a design defect, a plaintiff must demonstrate that the product's design renders it unreasonably dangerous. *Calles*, 309 Ill.Dec. 383, 864 N.E.2d at 254. To determine whether a product is unreasonably dangerous, Illinois courts apply both the consumer-expectation test and the risk-utility test. *Id.*, 309 Ill.Dec. 383, 864 N.E.2d at 255. The consumer-expectation test asks whether a

product “failed to perform as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” *Id.*, 309 Ill.Dec. 383, 864 N.E.2d at 256. To that end, the consumer-expectation test requires that a plaintiff “establish what an ordinary consumer purchasing the product would expect about the product and its safety.” *Id.*, 309 Ill.Dec. 383, 864 N.E.2d at 254. The “ordinary consumer” is an objective persona that represents the typical user and purchaser of the product at issue. *Id.*, 309 Ill.Dec. 383, 864 N.E.2d at 256. Typically, application of the consumer-expectation test is a task for the jury, *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516, 327 Ill.Dec. 1, 901 N.E.2d 329, 353 (2008), but it can be decided as a matter of law where no reasonable jury could find that a product performed other than how an ordinary consumer would expect, *Calles*, 309 Ill.Dec. 383, 864 N.E.2d at 257; see also *Hadrys v. Biberach*, No. 1-09-0075, 2011 WL 9673575, at *6 (Ill. App. Ct. Dec. 23, 2011).

[19, 20] The risk-utility test requires that a plaintiff “demonstrate[] that the magnitude of the danger outweighs the utility of the product, as designed.” *Calles*, 309 Ill.Dec. 383, 864 N.E.2d at 257. In weighing risk versus utility, Illinois courts look to a wide variety of factors, which include “the magnitude and probability of the foreseeable risks of harm; the instructions and warnings accompanying the product; the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing; the likely effects of any alternative designs on pro-

duction costs; and conformity with industry standards, voluntary organization guidelines, and government regulation.” *Ferraro v. Hewlett-Packard Co.*, 721 F.3d 842, 846 (7th Cir. 2013) (citing *Mikolajczyk*, 327 Ill.Dec. 1, 901 N.E.2d at 335). On summary judgment, “the court must balance factors it finds relevant to determine if the case is a proper one to submit to the jury.” *Calles*, 309 Ill.Dec. 383, 864 N.E.2d at 261 (citing Restatement (Third) of Torts: Products Liability § 2, Reporters’ Notes, cmt. e (1988)). Then, if the case is submitted to the jury, the jury must determine what factors are relevant and what weight to give them. *Id.*; *Salerno v. Innovative Surveillance Tech., Inc.*, 402 Ill. App.3d 490, 342 Ill.Dec. 210, 932 N.E.2d 101, 109 (2010).

[21] Where the consumer-expectation and risk-utility tests produce different results, the risk-utility test prevails. *Mikolajczyk*, 327 Ill.Dec. 1, 901 N.E.2d at 352; see also *Ferraro*, 721 F.3d at 846. In such cases, it is more helpful to consider the tests in an integrated manner, with consumer expectations serving as one factor to weigh in the risk-utility calculus. See *Mikolajczyk*, 327 Ill.Dec. 1, 901 N.E.2d at 352–53. Moreover, while an open and obvious danger automatically obviates any duty to warn, not so where a design defect is concerned. *Calles*, 309 Ill.Dec. 383, 864 N.E.2d at 259–60. Rather, whether a design defect presents an open and obvious danger is just one additional factor to consider among the myriad others in the risk-utility calculus.⁸ *Calles*, 309 Ill.Dec. 383,

8. It is unclear how, under Illinois law, the open and obvious rule impacts application of the consumer-expectation test. Early decisions suggest that an openly and obviously dangerous defect can never constitute a design defect under the consumer expectation test. *Hunt v. Blasius*, 74 Ill.2d 203, 23 Ill.Dec. 574, 384 N.E.2d 368, 372 (1978) (holding that

“[i]njuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product,” and applying this rule in the context of the consumer-expectation test). This issue, however, is of limited importance given the determinative status of the risk-utility test.

864 N.E.2d at 260; *Blue*, 293 Ill.Dec. 630, 828 N.E.2d at 1145.

1. Truck Box

[22] Plaintiffs' first asserted design defect is the skateboard's truck box. In support of their argument that this feature rendered the skateboard unreasonably dangerous, Plaintiffs point only to the reason they think the truck box renders the skateboard defective: it is too easily removed, permitting individuals in Madison's position to take it off and ride the skateboard. Plaintiffs offer no evidence as to the expectations of ordinary consumers, nor do they argue that the risk presented by the truck box outweighs its utility relative to other potential deterrent devices. Because Plaintiffs have offered no meaningful argument in line with either test for determining liability for a design defect, Bravo is entitled to summary judgment. *Winters v. Fru-Con Inc.*, 498 F.3d 734, 744-45 (7th Cir. 2007) (affirming award of summary judgment on design defect claim where plaintiff did not offer any evidence of consumer expectations or comparative analysis of alternative designs); *see also Assaf v. Cottrell, Inc.*, No. 10 C 85, 2012 WL 4177274, at *3 (N.D. Ill. Sept. 19, 2012).

In any case, Plaintiffs could not establish a design defect regarding the skateboard and its truck box under either test, making their claim unfit to submit to a jury. Plaintiffs have offered no evidence from which a reasonable jury could find that the skateboard or the truck box did not function as an ordinary consumer would expect. Even if the truck box can be easily circumvented, an ordinary consumer would expect that riding a skateboard in a retail store would create a risk of falling down from its use. Thus, Plaintiffs cannot succeed under the consumer expectation test.

Under the risk-utility test, the open and obvious nature of the skateboard's pur-

ported defect again weighs in Bravo's favor. It also reduces the magnitude and possibility of harm, as explained above, pointing another factor in Bravo's favor. The parties acknowledge that the skateboard was equipped with a warning accessible to a reader in Madison's position that cautioned against use without proper protective wear. Finally, there is no evidence in the record from which the Court can evaluate the cost and utility of alternative designs for equipping Bravo's skateboards with deterrent devices, nor is there any indication that Bravo did not comply with industry standards, voluntary organization guidelines, or government regulations. On balance, therefore, the relevant factors under the risk-utility test weigh entirely in Bravo's favor regarding the skateboard's truck box, and Plaintiff's claim is unfit to submit to a jury.

2. Plastic Wrap

[23] Plaintiffs' argument that the skateboard's plastic wrap is a design defect fares no better. The plastic wrap is a design defect, Plaintiffs explain, because it covers the skateboard's grip tape, rendering the skateboard unsafe to ride with the wrap in place. Of course, this purported defect is in some tension with Plaintiff's initial position. Plaintiffs initially maintain that the skateboard is defective because the truck box fails to prevent it from being ridden in retail stores, while their second theory assumes such riding should occur and must therefore be made safer. This is an odd position for Plaintiffs to take.

Nevertheless, as Plaintiffs point out, "[a] strict product liability action may be based on an injury resulting from defective packaging." Pls.' Resp. (Bravo) at 9 (citing *Perez v. Fid. Container Corp.*, 289 Ill. App.3d 924, 225 Ill.Dec. 73, 682 N.E.2d 1150, 1153 (1997)). But *Perez* does not deal with a case where a product user failed to remove obvious packaging material prior

to using the product in a store without purchasing it, nor have Plaintiffs provided any authority holding as much.⁹ Plaintiffs have not provided any further analysis or support for their theory concerning the plastic wrap under either the consumer-expectation or the risk-utility test, which again requires summary judgment in Bravo's favor. *Winters*, 498 F.3d at 744–45. Moreover, it is not reasonably foreseeable that an ordinary skateboard user would ride a skateboard without first removing the plastic wrap, and if a skateboard user did so, he or she would reasonably expect to fall, negating any finding of defect under the consumer-expectation test. Finally, the utility of protecting a skateboard's appearance for sale outweighs the need to eliminate the open and obvious risk presented by riding the skateboard with the plastic wrap on. Accordingly, Plaintiffs' design defect theory based on the skateboard's plastic wrap also fails.

For these reasons, the Court concludes that no reasonable jury could find that Bravo's skateboard suffered from a design defect and the Court therefore grants summary judgment to Bravo on Plaintiffs' strict products liability claim.

Conclusion

For the foregoing reasons, Target's motion for summary judgment [61] and Bravo's motion for summary judgment [73] are granted. Civil case terminated.

IT IS SO ORDERED.



9. Plaintiffs seek to draw on *Miller v. Rinker Boat Co.*, 352 Ill.App.3d 648, 287 Ill.Dec. 416, 815 N.E.2d 1219 (2004), by analogy. In *Miller*, the plaintiff alleged various design defects related to anti-skid paint applied (and in some areas, not applied) to the surface of a boat, including that the paint failed to prevent indi-

Oleg KOSTOVETSKY, individually and on behalf of all others similarly situated, Plaintiff,

v.

AMBIT ENERGY HOLDINGS, LLC, Ambit Midwest, LLC, Ambit Texas, LLC, Ambit Northeast, LLC, Ambit New York, LLC, Ambit Marketing, LLC, Ambit Illinois, LLC, Ambit California, LLC, Ambit Holdings, LLC, Ambit New Jersey, LLC, Ambit Management, Inc., Ambit Group, L.P., Ambit Systems, Inc., Jere Thompson, Jr., Chris Chambless, and John Does 1–100, Defendants.

15 C 2553

United States District Court,
N.D. Illinois, Eastern Division.

Signed March 10, 2017

Background: Natural gas customer brought putative class action alleging that natural gas limited liability company (LLC), along with 100 consultants, perpetrated a scheme to defraud him and thousands of other natural gas customers in violation of Racketeer Influenced and Corrupt Organizations Act (RICO) and state unjust enrichment law. The United States District Court for the Northern District of Illinois, Gary Feinerman, J., 2016 WL 105980, denied LLC's motion to dismiss. The LLC moved for summary judgment and to strike arguments in customer's summary judgment response. New York customer who was putative class member in New York state court action against the LLC moved to intervene as plaintiff, and

viduals from slipping on it when wet, which was an intended and reasonably foreseeable circumstance in using the boat. *Id.*, 287 Ill. Dec. 416, 815 N.E.2d at 1235–36. But unlike using a boat in water, riding a skateboard covered in plastic wrap in a retail store is not an intended or reasonably foreseeable use.