

**Randy Swix, Pamela Swix, Co-Conservators of the Estate Of Aaron Ray Swix, Plaintiffs-Appellants, v. Daisy Manufacturing Co., Inc., Defendant-Appellee.**

United States Court of Appeals for The Sixth Circuit  
373 F.3d 678 (2004)

[After losing the use of one eye, Aaron Swix (ten-years of age) together with his parents brought this products liability action against Daisy, the manufacturer of the air rifle which was used to shoot him, alleging that the air rifle was defectively designed. Aaron lost the sight of an eye when another child, believing the BB gun was empty, pointed it at Aaron and fired.

Daisy wanted the case dismissed because the BB gun is a “simple tool” with an “open and obvious” danger. The obviousness of a danger is merely one factor in the analysis of whether the risks are unreasonable in light of the foreseeable injuries. The obvious nature of the alleged defect does not preclude the possibility that an alternative design could reduce the risk of harm at a cost and in a manner that maintains the product’s utility. In a design defect case, the court must also consider whether a manufacturer should have created the danger in the first place. Consequently, the court addresses two questions. First, is a Daisy air rifle a "simple tool" under Michigan law? Second, if so, is the danger alleged to be associated with a Daisy air rifle "open and obvious"?)

JUDGES: Before: MARTIN, CLAY, and CUDAHY, Circuit Judges.

OPINIONBY: RICHARD D. CUDAHY

Your mother refused to buy you a BB gun, warning that "you'll shoot your eye out." Apparently she was right to be concerned. Based on the facts of this case and a review of other cases on the topic, it seems that BBs are attracted to children's eyes as politicians are attracted to television cameras. After losing the use of one eye, Aaron Swix together with his parents brought this products liability action against Daisy, the manufacturer of the air rifle which was used to shoot him, alleging that the air rifle was defectively designed. The district court dismissed Swix's complaint. This appeal followed.

I

In May of 1999, Albert Carl Porrit purchased a Daisy Powerline 856 air rifle for his minor grandson, Nicholas Porritt. The air rifle was kept in a locked gun cabinet. On April 20, 2000, Nicholas, then age eleven, removed the loaded air rifle from the gun cabinet without permission. According to his affidavit, Nicholas took the safety lock off the gun and checked to see if the air rifle was empty. .... He then shook the rifle with the barrel facing down toward the floor. He pulled the bolt back and tilted the gun towards

himself to see if there was a BB inside the rifle. He believed at this point that the rifle was empty. He subsequently pumped the rifle about five times and shot it at the floor. Only air came out. He then took the air rifle to the basement, pumping the rifle as he walked. When he got to the basement, he began to watch a movie and held the air rifle in his lap. Halfway through the movie, he picked up the air rifle, pointed it at his ten-year old friend Aaron Swix and "the air rifle went off." .... According to the plaintiffs, the result was painful and permanent injury to Aaron Swix and virtually complete loss of sight in his left eye.

On January 14, 2002, Aaron Swix and his parents filed a products liability suit against Daisy Manufacturing Company, in the Eastern District of Michigan, seeking one million dollars and alleging claims of defective design and failure to warn of a known danger. In their amended complaint, the plaintiffs argued that "the BB storage magazine in the model was dangerously and defectively designed [in that] . . . it allowed a BB to become lodged in the forward portion, between the barrel and interior of the outer barrel assembly . . . thus misleading the operator to believe . . . the air rifle, to be completely empty of BBs, [even after pumping and firing], when, in fact, a BB would still be present in the magazine." ...

On March 14, 2002, Daisy filed a motion to dismiss the complaint arguing that a gun is a "simple tool" under Michigan law and the dangers of pointing it at another person are "open and obvious." ..., Magistrate Judge Pepe granted the plaintiffs' motion to amend their complaint to include the allegation that "defendant's primary marketing target (and principle [sic] consumers) was/were children and young adults" and that "the model was particularly dangerous and defective when placed in the hands of minor children." ....

...

## II

...

The district court dismissed Swix's complaint in this case finding that he had failed to establish that Daisy owed Swix a duty of care. .... Under Michigan law, both a failure to warn claim and a defective design claim require a plaintiff to establish that the defendant owed him a duty of care. There is also a defense under Michigan law to the duty requirement in a failure to warn and in a defective design claim known as the "simple tool rule." *See Fisher v. Johnson Milk Co., Inc.*, 383 Mich. 158, ...

In *Fisher*, a failure to warn case, a milkman sold a patent attorney a wire carrier made to carry four half-gallon bottles of milk. ... On arriving home from the market with his carrier containing four milk bottles, the attorney slipped on some ice in such a manner that the bottom of the carrier struck the sidewalk, causing the bottles to break. .... He extended a hand in order to break his fall and his palm landed on a piece of broken bottle, severely injuring his hand. The attorney brought suit against the manufacturer of the wire carrier. The court in *Fisher* found that "a manufacturer owes no duty to warn of an open and obvious danger associated with the use of a simple [tool]." ... The parties do not dispute that this is a correct statement of law with respect to a failure to a warn claim.

A. Is the "simple tool" rule an absolute defense to a defective design claim?

The parties do seem to disagree, however, whether the fact that a product is deemed a "simple tool" and the danger is "open and obvious" is an absolute defense to a defective design claim or whether the obviousness of a danger is merely one factor in the analysis of whether the risks are unreasonable in light of the foreseeable injuries. We agree with virtually every Michigan court which has opined on the matter, all of which have suggested that the obviousness of a danger is merely one factor in the analysis of whether the risks are unreasonable in light of the foreseeable injuries. ... The Supreme Court of Michigan has explained why obvious dangers should be treated differently in the design defect context than in the failure to warn context. ...

In the design defect context, obvious risk may unreasonably breach the duty to adopt a design that safely and feasibly guards against foreseeable misuse. Because the manufacturer's liability for choice of design is not determined solely by looking at the obvious nature of the alleged defect, obviousness of the danger does not preclude the possibility that an alternative design could reduce the risk of harm at a cost and in a manner that maintains the product[s] utility.

In the failure to warn context, the obvious nature of the simple product's potential danger serves the core purpose of the claim, i.e., it functions as an inherent warning that the risk is present. Stated otherwise, if the risk is obvious from the characteristics of the product, the product itself telegraphs the precise warning that plaintiffs complain is lacking.... In other words, there is no need to warn of a danger where the danger is obvious, but in a design defect case, the court must also consider whether a manufacturer should have created the danger in the first place. For instance, the danger associated with a rag-doll with steak knives for arms ("Steak Knife Sally") may be quite obvious, but it is equally clear that the risks associated with such a design choice far outweigh the utility.

Our opinion in *Kirk* is in accord. *See* 16 F.3d 705. In *Kirk*, we were not asked to decide whether the fact that a danger is "open and obvious" is an absolute defense to a defective design claim or whether the obviousness of a danger is merely one factor in the analysis of whether the risks are unreasonable in light of the foreseeable injuries. Instead, the question presented to this Court was whether the "simple tool rule" applies in design defect cases at all. ...

..., *Kirk* suggests that the test is not simply whether the danger is "open and obvious," but instead whether the risks were unreasonable in light of the foreseeable injuries. ...

Daisy argues that the "open and obvious" nature of a danger is dispositive ....

...we find that the fact that a product may be a "simple tool" is not dispositive in a design defect case--the obviousness of a danger is merely one factor in the analysis of whether the risks are unreasonable in light of the foreseeable injuries. The fact that a

multi-factor analysis may be involved, however, will not prevent a defective design claim involving a simple tool from being decided as a matter of law where reasonable minds could not differ as to the outcome. ...

In sum, whether the danger associated with a simple tool is "open and obvious" will determine whether a manufacturer owes a duty to warn and is also an important factor in deciding a design defect claim. This inquiry requires us to address two questions. First, is a Daisy air rifle a "simple tool" under Michigan law? Second, if so, is the danger alleged to be associated with a Daisy air rifle "open and obvious"?

B. Is an air rifle a "simple tool"?

Michigan caselaw does not provide a clear test for determining whether a product is a "simple tool." However, the courts have categorized products as simple tools when one or both of the following conditions exist: (1) the products are not highly mechanized, thus allowing the users to maintain control over the products; (2) the intended use of the products does not place the users in obviously dangerous positions. ... For example, courts have found hammers, knives, gas stoves, axes, buzz saws, propeller driven airplanes, trampolines and backyard pools to be simple tools. ... We have also found guns to be simple tools. ....). As far as we are aware, no Michigan court has specifically considered whether an air rifle or BB gun, as opposed to a firearm, is a "simple tool." Fortunately, this is the easier of the two questions which we must answer. Swix does not argue that an air rifle is more "highly mechanized" than other guns. Similarly, the intended use of an air rifle does not appear to place the user in a significantly different position than users of firearms. In short, Swix's complaint does not even attempt to distinguish an air rifle from a firearm in any way relevant to the determination of whether it is a "simple tool." Although Swix argues that an air rifle can mislead the operator into believing it is empty when it is actually loaded, we have noted the same to be true of a firearm. ... Therefore, we agree with the district court that Swix has failed to demonstrate that an air rifle is anything but a "simple tool."

C. Is the danger alleged here to be associated with a Daisy air rifle "open and obvious"?

The second question, whether the danger associated with a Daisy air rifle is "open and obvious," is more difficult. In answering this question, "the focus is the *typical user's* perception and knowledge of whether the relevant condition or feature that creates the danger associated with use is fully apparent, widely known, commonly recognized, and anticipated by the *ordinary user or consumer.*" ... ("Courts have usually meant by 'obvious danger' a condition that would ordinarily be seen and the danger of which would ordinarily be appreciated by those who would be expected to use the product.").

In this case, Swix amended his complaint one week before the district court granted Daisy's motion to dismiss to allege that "defendant's primary marketing target (and principle [sic] consumers) was/were children and young adults." .... In essence, Swix has alleged that the typical or intended users of the Daisy air rifle are children. <sup>n4</sup> We

believe that the district court was unaware of this amendment at the time it granted the defendant's motion to dismiss, which may explain its holding.

---

<sup>n4</sup> According to the affidavit of William F. Kitzes, Swix's expert, a September 1975 study commissioned by Daisy found that the median age of purchasers of Daisy Power Line guns was twelve years old. ....

---

This allegation is crucial in that it distinguishes this case from every Michigan case which holds that the dangers associated with guns or other products intended for adults were "open and obvious." These cases all applied an "objective reasonable adult standard," not because it was an adult who was using the product which caused injury, but because the product in question was intended for and typically used by adults. . . . [In contrast,] [a] manufacturer who bypasses adults, upon whom the law ordinarily places responsibility, and markets a simple, but dangerous, tool directly to children may not avoid liability on the ground that the child 'should have known better.'").

If the typical user of a Daisy air rifle is a child, which we must presume to be true on a motion to dismiss, an objective reasonable child standard must apply. ... ("One has no right to demand of a child, or of any other person known to be wanting in ordinary judgment or discretion, a prudence beyond his years or capacity."); ... "The test to determine whether a danger is obvious is an objective one, not dependent upon the actual knowledge of the user, or his actual awareness of the danger. It is the knowledge and realization of the danger that would be possessed by the ordinary consumer who purchases or uses the product . . . . If the product is one customarily used by children, the danger must be one which children would be likely to recognize and appreciate in order to prevent them from recovering for a product related injury on the grounds that the danger was open and obvious." W. Kimble & R. Leshner, *Products Liability* § 196 (1979).

Therefore the question presented here is whether the reasonable child of whatever age the typical user of a Daisy air rifle is determined to be would know that it would be dangerous to aim the rifle at another and click the trigger, even after going through the process of emptying and testing the rifle that Porritt allegedly went through in this case. Given that this question has not yet been answered by any Michigan court and given that reasonable minds could differ as to the answer, we believe this question is not particularly appropriate for determination as a matter of law. ...

Finally, though it might conceivably support a comparative negligence defense, the fact that Daisy intended that its air rifle be used under the direct supervision of an adult and that Swix's grandfather had the same rule does not alter the "reasonable child standard" that applies in this case. ..., while there is no question that an air rifle *should* be used with adult supervision, the complaint alleges that the typical user of a BB gun is a child, so that is the standard the district court must apply.

Moreover, a manufacturer has a duty to protect against foreseeable misuses. ... It is certainly foreseeable that a twelve year old child will on occasion use a BB gun which

was purchased for his use, without direct supervision, or that any supervision will be inadequate to protect against a split-second decision by the minor to aim at another. ...

### III

Therefore, for the reasons discussed *supra*, we reverse the district court's grant of defendant's motion to dismiss and remand this case to the district court for further proceedings not inconsistent with this opinion.

\* \* \*

## Questions

1. Is a strict liability rule efficient for a “simple tool” with an obvious danger? Explain.
2. If Daisy is found liable in the subsequent case, how might this affect the market for air rifles? Is this likely to be efficient or inefficient?
3. If Daisy is found liable, does this relieve the parents of responsibility? How might this affect the cost of precaution?
4. If Daisy is found liable, how will this affect the market for air rifles?