

[Products Liability Law Daily Wrap Up, TOP STORY—DEFENSES TO LIABILITY—Ind. App.: Defense of misuse in grinder injury case a question for jury to decide, \(Jan. 2, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Kathleen Bianco, J.D.

Whether the alleged misuse of a hand-held grinder defeated the manufacturer's liability was a question for a jury to answer, the Court of Appeals of Indiana held in reversing a trial court's grant of summary judgment in favor of the manufacturer on a defective design claim filed by an individual who was injured when he used the product in an unauthorized manner without the appropriate safety equipment. The appellate court also affirmed the lower court's denial of summary judgment on the user's failure to warn claim. Thus, the court determined that the manufacturer was not entitled to summary judgment and remanded the matter to the trial court ([*Campbell Hausfeld/Scott Fetzer Co. v. Johnson*](#), December 29, 2017, Altice, R.).

The user of a hand-held grinder tool lost his eye and suffered other facial injuries while using the tool designed and sold by Campbell Hausfeld/Scott Fetzer Co. At the time of the accident, the user was operating the grinder with an attached cut-off disc rated at 19,000 RPM without a safety guard and while only wearing prescription glasses that were made of safety glass. The instructions and warnings on the tool clearly indicated that the user must wear safety glasses while using the tool. Furthermore, the instructions stated not to use the tool with a cut-off disc unless a safety guard is in place and to only use accessories rated at or above 25,000 RPM. As a result of his injuries, the user filed a product liability suit against the manufacturer. In response, the manufacturer filed a motion for summary judgment alleging the defenses of misuse, alteration, and incurred risk. A trial court granted the manufacturer's motion for judgment on the defective design claim after finding that the manufacturer had established misuse as a matter of law due to the user's failure to wear safety glasses while using the grinder, but denied the motion for judgment as to the failure to warn claim. Both parties appealed.

Indiana Products Liability Act. The user's claims alleging defective design and failure to warn were governed by the Indiana Products Liability Act (IPLA), which provides that "a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer...is subject to liability for physical harm caused by that product to the user or the consumer[.]" Under the IPLA, a product may be considered defective due to a manufacturing flaw, a design defect, or a failure to warn of dangers in the product's use. The IPLA contains three affirmative defenses to a products liability action. They are misuse, alteration, and incurred risk. The manufacturer asserted all three defenses against the claims raised by the user.

Misuse. In order to assert a misuse defense, the manufacturer must prove that the user misused the product in an unforeseeable manner that ultimately caused the physical harm endured by the user. In this case, the manufacturer contended that the user misused the grinder by failing to wear appropriate safety glasses and by using a cut-off disc with an inadequate RPM rating without a safety guard in place in direct contravention of the tool's operating instructions and warning. None of these misuses were unforeseeable. The evidence showed that the user believed that his prescription glasses were sufficient safety glasses. The court opined that it could not say as a matter of law that the manufacturer could not reasonably foresee a user confusing other eyewear with safety glasses. Furthermore, even if the user's failure to wear safety glasses constituted misuse, his fault in that regard would need to be weighed by a jury based on the principles of comparative fault.

As to the user's use of the cut-off without a guard, the instructions provided with the tool established that the manufacturer foresaw the possibility of the use of the cut-off with the tool. Moreover, whether the use of a below rated RPM disc was a cause of the user's injuries remained a material issue of fact based upon evidence

presented by both parties. Accordingly, the court concluded that the manufacturer was not entitled to judgment based on the defense of misuse.

Alteration. As to the alteration defense, the manufacturer must show that the cause of the physical harm was a modification to the product made by any person after the product's delivery to the initial user or consumer that was "not reasonably expectable" by the seller. Because the tool was designed to be used with attachments that were purchased separately by the user and the operating instructions implied that a "cut-off disc mandrel" may be attached to the tool, the manufacturer could not contend that it could not have reasonably expected that a user would attach a cut-off using a mandrel. Consequently, the alteration defense was not sustainable.

Incurred Risk. The incurred risk defense is a complete defense not subject to comparative fault. The defense applies if the user bringing the claim knew of the defect, was aware of the danger, and still proceeded to make use of the product and was injured. In support of this defense, the manufacturer pointed to two cases where the defense was accepted to negate liability. The court found the manufacturer's argument unavailing because in each of the cited cases, the manufacturer had provided users with express warnings. In the case at hand, the evidence did not establish that the manufacturer provided a legally sufficient warning regarding the dangers of using the tool without a guard. While a jury may find based on the user's experience and knowledge that he was aware of and accepted the specific risk involved in using the tool without a guard, it was not the sole inference that could be drawn from the evidence. Thus, summary judgment based on the defense of incurred risk was not warranted.

Other issues. In a last-ditch effort to avoid liability, the manufacturer asserted that the defective design claim failed as a matter of law based upon perceived inadequacies in the user's expert affidavit. The court rejected this attempt, stating that in Indiana it is not enough for a party moving for summary judgment to point out alleged failings in the nonmovant's evidence; it must present its own evidence and affirmatively demonstrate the absence of a genuine issue of material fact as to a determinative issue.

The case is No. [64A03-1705-CT-984](#).

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Companies: Campbell Hausfeld

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