

STATE OF INDIANA)
) SS:
COUNTY OF PORTER)

PORTER SUPERIOR COURT NO. 5
CAUSE NO. 64D05-1407-CT-005893

PAUL JOHNSON,

Plaintiff,
vs.

CAMPBELL HAUSFELD/SCOTT
FETZER COMPANY,

Defendant.

ORDER

FILED
IN OPEN COURT

MAR 10 2017

Mary R. Harper
Porter Circuit and Superior Court

This matter comes before the Court for hearing on Campbell Hausfeld/Scott Fetzer Company's (Campbell Hausfeld) Motion for Summary Judgment ("Motion"). Plaintiff appears by Counsel Theodore Stacy, Defendant Campbell Hausfeld by Counsel J. Curtis Greene and Meredith Thornburgh White. Evidence was presented and arguments were heard. The Court now enters the following Findings of Fact, Conclusions of Law, and Judgment:

Procedural Background

Defendant moved for summary judgment on all of Plaintiff Paul Johnson's claims and submitted a brief that designated all evidence in support of the motion on September 29, 2016. Plaintiff filed a brief in opposition on November 14, 2016 and designated evidence of his own. Separately, Plaintiff filed an Additional Designation of Evidence and a Second Additional Designation of Evidence on November 14, 2016. The briefing closed when Campbell Hausfeld filed a reply in support of the Motion on December 5, 2016. The Court heard oral argument in the Motion January 18, 2017.

RECEIVED

MAR 10 2017

CLERK
PORTER COUNTY CLERK

Findings of Fact

1. The Plaintiff, Paul Johnson, is a resident of LaPorte County.
2. On August 20, 2012 he was injured while using a Campbell Hausfeld TL1120 die grinder.
3. On August 20, 2012, Paul Johnson's friend, Andrew Reed, showed up at Johnson's house around 9:00 PM.
4. Reed and Johnson decided to undertake a project on Reed's truck headlights.
5. Reed and Johnson planned to follow instructions they found on the internet to trim around the truck's headlight opening to accommodate a larger headlight.
6. Johnson selected the TL1120 die grinder to cut the headlight opening of Reed's truck.
7. Johnson choose the TL1120 die grinder for use because the die grinder's narrow frame would allow him to reach into a tight spot inside the trucks headlight opening.
8. Johnson attached a cut-off disc to the grinder. To do so, he found a mandrel that fit into the receiving end of the die grinder and also accommodated a disc on the other end. He also placed a spacer between the bolt and the receiving part of the bolt on the mandrel. The mandrel was not manufactured by Campbell Hausfeld and was not provided with the die grinder.
9. While using the TL1120 a part of the cut-off disc broke off and struck Johnson in the eye.

10. As a result of the injury Johnson underwent two surgeries and ultimately one of his eyes had to be removed.

11. Campbell Hausfeld is a Delaware corporation that sells tools to consumers through retailers in the United States.

12. Campbell Hausfeld designed the TL1120 Air Die grinder. From approximately 2000 through 2011, Campbell Hausfeld sold the TL1120 in stores throughout the United States.

13. The TL1120 die grinder is a hand held air powered tool approximately 8 inches in length.

14. The TL1120 die grinder contained warnings and instructions in three locations: the packaging, the operating instructions, and on the die grinder itself.

15. The package for the TL1120 stated that the product was an "Air Die Grinder," and showed the product through a clear plastic window.

16. The package also contained a picture of the die grinder in use in a narrow opening, with a small circular grinding stone attached.

17. There is not a guard on either the die grinder as packaged or on the picture of the grinder contained on the packaging.

18. The packaging for the die grinder also stated in at least two places, in English, with red coloring: "Produces 25,000 RPM."

19. The operating instructions state "[r]ead carefully," to "protect yourself by observing all safety information," that "failure to comply with instructions could result in personal injury," and to "read all manuals included with this product carefully." The user is instructed to "retain instructions or future reference."

20. The operating instructions use bold lettering, signs, and pictures to show the consequences of not adhering to valid warnings. The following legend is found on the instructions:

Safety Guidelines

This manual contains information that is very important to know and understand. This information is provided for **SAFETY AND TO PREVENT EQUIPMENT PROBLEMS**. To help recognize this information, observe the following symbols.



*Danger alerts you to a hazard that **WILL** result in death or serious injury*



*Warning alerts you to a hazard that **COULD** result in death or serious injury.*



*Caution alerts you to a hazard that **MAY** result in minor injury.*



Notice alerts you to important information that will help you prevent damage to equipment.

21. The operating instructions contain a warning to wear safety glasses:



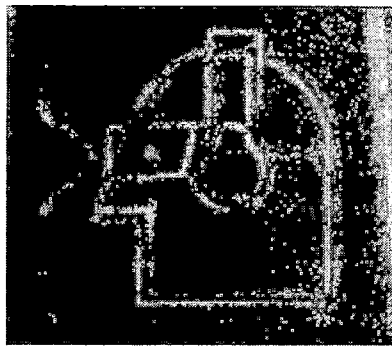
Safety glasses and ear protection must be worn during operation.

22. Operating instruction number 15 states: "Do not use a cut-off disc mandrel on this tool unless a safety guard is in place." This statement is not labeled with any of the safety guidelines symbols, Danger, Warning, Caution or Notice.

23. The operating instructions further inform the user to only use attachments that are rated to spin at 25,000 RPM.

WARNING Make sure attachment stem is fully inserted into collet opening and collet is securely tightened. Loose attachments could fly off during operation and cause serious injury. Only use attachments rated for a minimum of 25,000 RPM.

24. On the handle of the Die Grinder the words "READ MANUAL" appear. Also on the handle is the universal sign for safety glasses:



25. On the main blue area on the body of the tool, next to the spinning adaptor end, the following words are found:

**25,000 RATED RPM
WARNING
USE ACCESSORIES
RATED AT OR ABOVE
TOOL RATED RPM**

Conclusions of Law

26. Summary judgment is appropriate only when the designated evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. *Cook v. Ford Motor Co.*, 913 N.E.2d 311, 318 (Ind. Ct. App. 2009) citing, *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991).

27. In negligence cases, summary judgment is rarely appropriate. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996); accord, *Guy's Concrete, Inc. v. Crawford*, 793 N.E.2d 288, 293 (Ind. Ct. App. 2003), *trans. denied*, *Modern Heating & Cooling, Inc. v. Crawford*, 804 N.E.2d 760, 2003 Ind. LEXIS 1086 (Ind. Dec. 18, 2003). This is because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person - one best applied by a jury after hearing all of the evidence. *Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind. 2004)

28. When a defendant is the moving party, it is entitled to summary judgment if it can demonstrate that either the undisputed material facts negate at least one element of the plaintiff's claim, or if it raises a valid affirmative defense, which bars the plaintiff's claim. *Meyers v. Furrow Bldg. Materials*, 659 N.E.2d 1147, 1148 (Ind. Ct. App. 1996)

29. Plaintiff's First Amended Complaint was filed August 20, 2014. There are two counts in the Complaint.

30. In Count I, Plaintiff alleges Campbell Hausfeld's TL1120 die grinder was defective in its design because it did not include appropriate warnings and safety devices with the sale of each grinder.

31. In Count II, Plaintiff re-alleges his defective design theory, stating: the Defendant manufactured and sold the Model TL1120 die grinder with the intent that the die grinder could also be adapted and used with an unguarded cut off wheel. The die grinder came with no shield to protect the user from wheel disintegration, and the lack of a guard on the die grinder delimits wheel diameter velocity and causes wheel disintegration. Plaintiff also adds a claim of defective warnings alleging that the TL1120 "instructions contains [sic] inadequate warnings against using the product with the integrated defect," that the packaging does not include "information on how to obtain a guard," and the product has "no warning placard."

32. This action is governed by the The Indiana Products Lialibity Act. ("IPLA") The IPLA applies in all actions that are: 1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; regardless of the substantive legal theory or theories upon which the action is brought." Ind. Code Ann. § 34-20-1-1.

33. Johnson is seeking damages for injuries related to his use of the TL1120 die grinder. Therefore, the Indiana Products Liability Act applies because Johnson is (1) a consumer, (2) seeking damages against a manufacturer or seller, (3) for physical harm allegedly caused by a product. *See* Ind. Code Ann. § 34-20-1-1.

34. The IPLA applies to all product liability actions whether the theory of liability is negligence or strict liability. *See Stegemoller v. ACandS, Inc.*, 767 N.E.2d 974, 975 (Ind. 2002).

35. To establish a claim under the IPLA, the plaintiff must prove that a product was placed into the stream of commerce in a defective condition unreasonably dangerous to any user and that the plaintiff's injuries were caused by that product. Ind. Code Ann. § 34-20-2-1.

36. A product may be defective within the meaning of the IPLA because of a manufacturing flaw, a defective design, or a failure to warn of dangers in the product's use. *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003).

37. Neither defective design claims nor failure to warn claims are subject to strict liability. *See TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201, 209 (Ind. 2010).

38. In an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions. Ind. Code § 34-20-2-2.

39. The IPLA provides three non-exclusive defenses to any products liability action. Ind. Code Ann. § 34-20-6-1, et seq. These defenses include Incurred Risk or User Aware of the Danger §34-20-6-3, Misuse of Product, §34-20-6-4, and Modification or Alteration of Product §34-20-6-5.

40. The Defendant asserts all three defenses in response to Plaintiff's claim in Count I of defective design for failure to supply appropriate safety devices and the claim in Count II that the design of the die grinder was defective because it can be used with an unguarded cut-off wheel. Defendant responds separately to Plaintiff's additional claim in Count II that the TL1120 had defective warnings.

41. Defendant asserts he is entitled to Summary Judgment under all three defenses and as to Plaintiff's assertion on Defective Warnings.

Misuse of Product

42. It is a defense under the IPLA that the product was misused. *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1028 (Ind. Ct. App. 2003). Specifically, Indiana Code § 34-20-6-4 provides a defense if the "cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party." Foreseeable use and misuse are often questions of fact for a jury to decide. *Id.* at 1028. (citing *Vaughn v. Daniels Co. (West Virginia), Inc.*, 777 N.E.2d 1110, 1129 (Ind. Ct. App. 2002)). However, summary judgment is appropriate when the undisputed evidence proves that the plaintiff misused the product in an unforeseeable manner. *See Barnard*, 790 N.E.2d at 1029; *Vaughn*, 777 N.E.2d at 1129 (citing *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218, 1221 (7th Cir. 1984) (barring claim of worker who attempted to ink printer by hand where it was not intended that printer be inked by hand)); *see also Latimer v. General Motors Corp.*, 535 F.2d 1020, 1024 (7th Cir. 1976) (holding manufacturer had no duty to anticipate misuse).

43. Misuse is established as a matter of law when the undisputed evidence proves that the plaintiff used the product in direct contravention of the product's warnings and instructions. *See Barnard v. Saturn Corp., a Div. of Gen. Motors Corp.*, 790 N.E.2d 1023, 1029 (Ind. Ct. App. 2003)

44. Defendant asserts that Plaintiff misused the die grinder by (1) attaching a cut-off disc without a guard in place, (2) attaching a cut-off disc that was not rated for the die grinder, and (3) by using the die grinder without proper safety glasses. Plaintiff admits that he reviewed the warnings in the product's instructions as well as those printed on the die grinder itself.

45. There is a clear warning that safety glasses must be used when operating the TL1120. The instructions with the TL1120 specifically state, "**WARNING** – Safety glasses and ear protection must be worn during operation." The symbol for proper safety glasses is included not only in the instructions but additionally on the body of the die grinder itself. It is clear from the safety glass symbol, that safety glasses must be worn. It contains an arrow indicating the glasses will deflect objects from hitting the eyes. (see photo Paragraph 25)

46. The evidence is uncontroverted that at the time of the accident Plaintiff was wearing his regular glasses and that he was not wearing safety glasses. The court does not find persuasive plaintiff's argument that he was unaware of the meaning of the term safety glasses because no definition was offered in the operating instructions. It is true there is no written definition of safety glasses in the operating instructions. However, the universal warning symbol for safety glasses is contained in the operating instructions and on the body of the grinder. This universal symbol provides a clear warning and

visual definition of safety glasses that can be understood by a user in any country, speaking any language.

47. The Amended Complaint is not clear on the cause of action alleged in each count. Count II claims design defect relative to the use of a cut off wheel. Count II also claims that the product instructions contains inadequate and defective warnings against using the product with the integrated defect. This language is confusing but indicates that the inadequate and defective warnings relate to the alleged design defect.¹

48. The Court concludes that Plaintiff's misuse of the die grinder by failing to wear safety glasses in violation of the instructions and warnings entitles Campbell Hausfeld to summary judgment on Count II.

49. Presently it is an open issue of Indiana law whether these defenses constitute complete defenses or if the defenses must be weighed against other factors as an element of comparative fault. *See Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1148 n.3 (Ind. 2003) (where the Supreme Court observed that the Seventh Circuit and Indiana Court of Appeals have held that statutory defenses are an element of Indiana's comparative fault analysis, but declined to adopt that reasoning because the issue was not presented in that case).

50. The Court finds that Campbell Hausfeld is entitled to summary judgment on Count II under either theory, because even if these defenses are an element of comparative fault, no reasonable juror could find that Paul Johnson was less than 51% at

¹ The Amended Complaint incorrectly labels Count II as Strict Liability. As stated previously neither defective design claims nor failure to warn claims are subject to strict liability. *See TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201, 209 (Ind. 2010)

fault in light of his violations of the instructions by failing to wear safety glasses while operating the TL1120.

51. Count 1, Paragraph 11 states in reference to the product “its inherent design defect caused grievous injury.” There is no other allegation concerning a specific design defect. Paragraph 12 alleges that the product did not have appropriate warnings and safety devices included in the sale.

52. Misuse would constitute a defense to an allegation of design defect if one was sufficiently made in Count I.

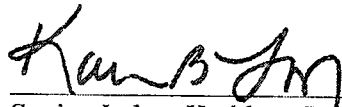
53. The issue of whether the IL1120 contained sufficient warnings to the purchaser about potential hazards presents a question on fact. For example, the statement in Instruction 15, “Do not use a cut-off disc mandral unless a safety guard is in place” is subject to more than one interpretation.

54. The Court finds that Campbell Hausfeld is entitled to summary judgment on Count I only regarding the allegation of design defect alleged in Paragraph 11. Summary Judgment is not entered on any of the other allegations in Count I.

JUDGEMENT

For the foregoing reasons, Campbell Hausfeld's Motion for Summary Judgment is granted in part and denied in part

SO ORDERED this 10th day of March, 2017.



Senior Judge, Kathleen Lang
Porter County Superior Court

Distribution:

J. Curtis Greene (#25600-29)
Meredith Thornburgh White (#28094-49)
J.T. Larson (#31392-29)
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204

Theodore L. Stacy
Attorney at Law
258 West US Highway 6
Valparaiso, IN 46385