

**INDEX OF EXHIBITS TO THE AMICUS CURIAE BRIEF
OF THE MICHIGAN ASSOCIATION FOR JUSTICE**

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Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MAUREEN ST. CLAIR,

Plaintiff,

Case No. 18-10142

vs.

HON. GEORGE CARAM STEEH

XPO LOGISTICS, INC. d/b/a
UX ASSEMBLY & INSTALLATION,
ICON HEALTH & FITNESS, INC.,
and CMC LOGISTICS, LLC,

Defendants.

_____ /

ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter came before the court on its order to show cause why plaintiff's complaint against defendant CMC Logistics, LLC should not be dismissed for lack of subject matter jurisdiction (doc. 52). At the hearing on the court's order to show cause, the parties agreed that the case should be maintained in Macomb County Circuit Court so that plaintiff may proceed against all the defendants in one action. Now, therefore, for the reasons stated on the record,

IT IS HEREBY ORDERED that the above-captioned case be
DISMISSED without prejudice and without costs.

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: December 6, 2019

Exhibit B

2007 WL 127793

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Tony KITZNER, Plaintiff-Appellant,

v.

HOUGHTON FLUID CARE, Defendant-Appellee
andCitizens Insurance Company, Subrogee of
Omega Industries, Inc., Intervening Plaintiff.

Docket No. 265148.

|

Jan. 18, 2007.

Wayne Circuit Court; LC No. 03-317203-NO.

Before: METER, P.J., and O'CONNELL and DAVIS, JJ.

Opinion

PER CURIAM.

***1** In this product liability action, plaintiff appeals as of right an order granting judgment of no cause of action in favor of defendant. We affirm.

This case arose out of an accident that took place on June 12, 1999, at Omega Industries, where plaintiff was employed as a machine operator. Plaintiff's responsibilities were to operate a Makino A-77 computer-controlled milling machine that was exclusively used to machine a magnesium component that was cast by another company and ultimately intended to be used in a car. Magnesium requires a certain amount of careful handling: the metal itself can burn dangerously, and it reacts with water to produce hydrogen gas, which is itself combustible. Proper coolant was therefore essential to the machining job. Testimony indicated that any coolant used for magnesium machining would need to be water-based to ensure proper thermal conduction, but would also contain some percentage of emulsified oil, a primary purpose of which is to prevent or reduce the hydrogen-generating reaction between the magnesium and the water. On the day of the accident, Omega was utilizing a coolant called Magnesol, which was developed and produced by Bencyn, defendant's predecessor in interest. Omega had switched to

Magnesol from a prior coolant in an attempt to cure a problem involving coolant lines clogging. Magnesol worked well for several months before developing an unexplained problem that resembled curdling. The accident itself was an explosion inside the Makino machine, producing a twelve-foot yellow-to-red colored fireball that blew plaintiff away from the machine and burned him. After the explosion, Omega repaired the Makino, conducted additional magnesium-safety training, switched back to the original coolant, and eventually switched to a third coolant.

The factual gravamen of plaintiff's claim in this case is that the Magnesol "split" or "separated," causing the visual appearance of curdling, impeding the Makino's coolant filtration system, and permitting the magnesium debris produced by the machining process to produce hydrogen. The trial court concluded that plaintiff's express warranty claim was precluded by the disclaimers prominently affixed to the barrels of Magnesol delivered to Omega, so the trial court granted directed verdict to defendant on that claim. The trial court concluded that the remainder of plaintiff's claims were merely restatements of plaintiff's failure to warn claim. After a nine-day jury trial, the jury was given a special verdict form containing the following questions and to which the jury answered:

1. Was defendant negligent by failing to warn potential users of magnosol [sic] of the danger in using magnosol [sic]? Answer: YES
2. Was defendant's failure to warn a proximate cause of plaintiff's injuries? Answer: YES
3. Was plaintiff's employer Omega a sophisticated user? Answer: YES
4. Was defendant negligent in one or more of the other ways claimed by plaintiff? Answer: YES
- *2** 5. Was defendant's negligence a proximate cause of plaintiff's injuries? Answer: YES
6. Did defendant breach an implied warranty? Answer: NO
7. Was defendant's breach of an implied warranty a proximate cause of plaintiff's injuries? Answer: NO ANSWER
8. Was Omega Industries negligent in one or more of the ways claimed by defendant. Answer: YES

9. Was Omega's negligence a proximate cause of plaintiff's injuries? Answer: YES

10. Was there a practical and technically feasible alternative product available that would have prevented the harm posed by magnosol [sic] that would not have significantly impaired the usefulness or desirability of the product? Answer: YES







11. Was plaintiff a sophisticated user? Answer: NO

12a. Was the injury in this case caused by an inherent characteristic of the product that could not be eliminated without substantially compromising the product's use or desirability? Answer: YES

12b. If your answer to 12a is yes, was that recognized by persons with the ordinary knowledge common to the industry community? Answer: YES

13. Using 100% as the total, enter the percentage of negligence attributable to the defendant and to Omega. Answer: DEFENDANT 70%, OMEGA 30%

The trial court held oral argument on the ramifications of the jury's findings, and it granted defendant's judgment of no cause of action on the ground that the sophisticated user defense precluded plaintiff's failure to warn claim. Plaintiff appeals from that order.

Questions of law are reviewed de novo.  *Wold Architects and Engineers v. Strat*, 474 Mich. 223, 229;  713 NW2d 750 (2006). We defer to the jury's role and opportunity to judge facts, and the jury's findings may be overturned only where the great weight of the evidence is manifestly against those findings. *Ellsworth v. Hotel Corp of America*, 236 Mich.App 185, 194; 600 NW2d 129 (1999). A trial court's findings of fact are reviewed for clear error.  *City of Novi v. Robert Adell Children's Funded Trust*, 473 Mich. 242, 249;  701 NW2d 144 (2005). A trial court's decision whether to grant a motion for directed verdict is reviewed de novo, considering all evidence and reasonable inferences in the light most favorable to the nonmoving party and granting the motion only if reasonable minds could not perceive the existence of a genuine factual question.  *Meagher v. Wayne State Univ*, 222 Mich.App 700, 708;  565 NW2d 401 (1997).





Plaintiff first argues that the “sophisticated user defense” should not apply because he, personally, was clearly not a sophisticated user. We disagree.

The “sophisticated user defense” is set forth by statute. Pursuant to [MCL 600.2947\(4\)](#):

Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.



*3 And pursuant to [MCL 600.2945\(j\)](#):

“Sophisticated user” means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

Presuming Magnesol was defective or dangerous, defendant would only be required to warn a user like plaintiff if defendant had no reason to believe plaintiff would realize the danger *and* defendant could not reasonably rely on Omega, the purchaser, to warn plaintiff of any dangers.  *Jodway v. Kennametal, Inc*, 207 Mich.App 622, 627;  525 NW2d 883 (1994). It is “well settled” that if the purchaser is a sophisticated user, the manufacturer is entitled to rely on the purchaser to communicate to the user any dangers.  *Cipri v. Bellingham Frozen Foods, Inc*, 235 Mich.App 1, 18-19;  596 NW2d 620 (1999).





Plaintiff therefore also contends that Omega should not be considered a sophisticated user because Omega relied on defendant for all of its information about Magnesol. The jury found Omega a sophisticated user, but plaintiff contends that the trial court should have granted directed verdict on this issue and refrained from submitting the question to the jury. We disagree.



Commercial users of bulk materials must generally be regarded as “sophisticated users” as a matter of law, subject only to analyzing whether the manufacturer’s dissemination of information was reasonable under the circumstances.

 *Bock v. General Motors Corp.*, 247 Mich.App 705, 714;  637 NW2d 825 (2001). Omega was clearly a commercial bulk user of Magnesol, and had been a commercial bulk user of other coolants, and of magnesium, for several years. Omega’s president had a bachelor’s degree in science and chemistry, he had specifically researched magnesium, and he made informed decisions whether to use certain safety devices with the magnesium machining operation. Expert testimony indicated that magnesium’s properties were “basic high school chemistry” and should be expected to be known by everyone in the field. Defendant’s president at the time was particularly impressed with Omega’s president. Although Omega was not specifically familiar with Magnesol, it was clearly familiar with magnesium and magnesium coolants in general, including their proper handling, maintenance, and inherent dangers. There is no indication that defendant acted unreasonably in presuming that Omega was knowledgeable in how to use a magnesium coolant safely. It is worth emphasizing that plaintiff contends that the trial court erred in failing to grant its motion for directed verdict, which would require that reasonable minds could not find a question of fact. Given Omega’s apparent level of knowledge and defendant’s apparent awareness thereof, the trial court correctly found, at a minimum, a question of fact for the jury whether Omega was a sophisticated user.

*4 We will not disturb the jury’s finding that Omega was a sophisticated user, and we therefore agree with the trial court that plaintiff’s personal level of sophistication is not relevant. The trial court properly granted a judgment of no cause of action against plaintiff’s failure to warn claim on the basis of the sophisticated user defense.

Plaintiff next contends that the trial court erred in merging all of his claims, other than his express warranty claim, into a failure to warn claim. We disagree.

We agree with the trial court that plaintiff’s alternative theories are no more than rephrasings of the same underlying assertion: that, in some manner, defendant did not communicate to plaintiff the fact that it was not safe for Omega to use Magnesol to machine magnesium in the Makino A-77 machine at Omega’s machine shop. “When a party brings a motion for summary disposition, courts ‘look beyond the face of a plaintiff’s pleadings to determine the gravamen or gist of the cause of action contained in the complaint.’”  *Electrolines, Inc v. Prudential Assurance Co, Ltd*, 260 Mich.App 144, 159;  677 NW2d 874 (2003), quoting *Sankar v. Detroit Bd of Ed*, 160 Mich.App 470, 476; 409 NW2d 213 (1987). The same principle applies here, where again a court must first determine what cause of action is being alleged in order to determine what legal principles to apply thereto. See also,  *Klein v. Kik*, 264 Mich.App 682, 686;  692 NW2d 854 (2005) (“regardless of plaintiff’s word choice, the gravamen of plaintiff’s complaint remains a cause of action for lost opportunity to survive brought on the basis of defendant’s alleged medical malpractice”). However plaintiff wishes to phrase his allegations, the underlying claim is one of failure to warn, which is subject to the sophisticated user defense.¹

Plaintiff argues that defendant had actual knowledge that the Magnesol was defective and likely to cause the injury that resulted in this action, thereby depriving defendant of the sophisticated user defense under  MCL 600.2949(A). That section was repealed by 1995 PA 249, effective March 28, 1996, which predates the accident in this case by more than three years and predates the first contact between Omega and defendant by more than two years. Therefore,  MCL 600.2949 was not in effect at any time relevant to this case and is of no consequence here.

Plaintiff argues that the trial court erred in granting directed verdict to defendant on plaintiff’s express warranty claim. We disagree.

The gravamen of plaintiff’s express warranty claim is that defendant’s representative, explicitly told Omega’s owner that Magnesol would be safe to use in Omega’s magnesium-machining operation. The gravamen of plaintiff’s failure to warn claim is that defendant failed to advise Omega that Magnesol would *not* be safe to use in Omega’s magnesium-

machining operation. Therefore, plaintiff's express warranty claim is again essentially no more than another restatement of his failure to warn claim: that defendant either did not tell Omega that Magnesol would produce hydrogen or did tell Omega that it would not.

*5 In any event, “[a]n express warranty is created by a seller by setting forth a promise or affirmation, description, or sample with the intent that the goods will conform.” *Scott v. Illinois Tool Works, Inc.*, 217 Mich.App 35, 42; 550 NW2d 809 (1996). Plaintiff specifically contends that defendant warranted three things: that Magnesol would not produce hydrogen when used to machine magnesium, that it was safe to use for machining magnesium, and that it was appropriate to use for machining magnesium. We have been provided with nothing in writing purporting to be an expression by defendant that Magnesol would not produce hydrogen, so we will not infer such a statement. See *Scott*, *supra* at 43. The Technical Data Sheet and the Material Safety Data Sheet, when viewed together, as they were apparently presented, indicate that Magnesol is “safe” in the sense of having low toxicity and few special handling requirements. It is clear that Magnesol, both by implication and by express statement in the Technical Data Sheet, is intended for use in machining magnesium, so any statement to that effect, without more, could be no more than a general affirmation of the value of the product. See *Carpenter v. Alberto Culver Co.*, 28 Mich.App 399, 402-403; 184 NW2d 547 (1970). The literature does indicate that Magnesol would form a “stable” emulsion. However, the evidence was that coolants needed to be maintained according to manufacturers' specifications and regularly checked or they could become ineffective. The regular maintenance and checks performed by Omega shows

that Omega did not in fact act as if Magnesol could be relied on to remain stable under any conditions whatsoever or without intense and regular maintenance. To the extent the technical documents' description of Magnesol as “stable” could be construed as a blanket guarantee that Magnesol would (or could) never destabilize, Omega clearly did not rely on it.

Any oral statements made by defendant to Omega are subject to the UCC statute of frauds, and they are therefore excluded to the extent they are inconsistent with the parties' written expressions. MCL 440.2202. The evidence further showed that Magnesol was delivered with an express disclaimer of any warranty. Plaintiff makes no argument that the disclaimer is “unreasonable,” MCL 440.2316(1), nor do we perceive it as unreasonable. Therefore, “express language disclaiming any warranty” warrants “summary disposition of plaintiff's express warranty claim.” *Computer Network, Inc v. AM Gen Corp.*, 265 Mich.App 309, 314; 696 NW2d 49 (2005). The trial court appropriately granted directed verdict in defendant's favor as to the express warranty claim.

Because of our resolution of the above issues, it is unnecessary for us to address plaintiff's remaining issues on appeal.

Affirmed.

All Citations

Not Reported in N.W.2d, 2007 WL 127793

Footnotes

- 1 Furthermore, under the common-law predecessor to the current statutory implementation of the “sophisticated user defense,” our Supreme Court explained that “[l]iability may not be avoided or imposed by skillful manipulation of labels such as instructions or warnings.” *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 630; 327 NW2d 814 (1982).

Exhibit C

2020 WL 39978

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.ESTATE OF Trask SIMPSON, by Scott
Simpson, Personal Representative,
Plaintiff-Appellee/Cross-Appellant,

v.

GENERAL MOTORS, LLC, formerly known as
General Motors Company, formerly known as Motors
Liquidation Company, formerly known as General
Motors Corporation, [Gonzalez Integrated Marketing](#),
doing business as Gonzalez Design Group, Gonzalez
Design Engineering, doing business as Gonzalez Design
Group, Gonzalez Technical Services, doing business as
Gonzalez Design Group, Gonzalez MFG Technologies,
doing business as Gonzalez Design Group, Gonzalez
Productions Systems, doing business as Gonzalez
Design Group, and [Gonzalez Contract Services](#), doingbusiness as Gonzalez Design Group, Defendants,
andJWF Technologies, LLC, doing business
as JWF Container Tech, and Keener
Corporation, Defendants-Cross-Appellees,
andStabilus, Inc., Defendant/Cross-
Defendant-Appellant/Cross-Appellee,
and

ZF North America, Inc., Defendant/Cross-Plaintiff.

Estate of Trask Simpson, by Scott Simpson, Personal
Representative, Plaintiff-Appellee/Cross-Appellant,

v.

General Motors, LLC, formerly known as General
Motors Company, formerly known as Motors Liquidation
Company, formerly known as General Motors
Corporation, [Gonzalez Integrated Marketing](#), doing
business as Gonzalez Design Group, Gonzalez Design
Engineering, doing business as Gonzalez Design
Group, Gonzalez Technical Services, doing business as
Gonzalez Design Group, Gonzalez MFG Technologies,
doing business as Gonzalez Design Group, Gonzalez
Productions Systems, doing business as GonzalezDesign Group, and [Gonzalez Contract Services](#), doing
business as Gonzalez Design Group, Defendants,
andJWF Technologies, LLC, doing business as JWF
Container Tech, Defendant-Appellant/Cross-Appellee,
andKeener Corporation, Defendant-Cross-Appellee,
andStabilus, Inc., Defendant/Cross-
Defendant-Cross-Appellee,
and

ZF North America, Inc., Defendant/Cross-Plaintiff.

No. 341961, No. 342291

|

January 2, 2020

Genesee Circuit Court, LC No. 16-107103-NO

Before: M. J. Kelly, P.J., and [Markey](#) and [Gleicher](#), JJ.**Opinion**

Per Curiam.

***1** This product liability action arises from the explosion of a gas spring. The spring was attached to the sidewall of a large metal rack owned by General Motors. GM used the rack to store and transport auto parts. Plaintiff Trask Simpson was severely injured when the gas spring violently separated as he raised the sidewall so that he could repair the rack's floor. The [cylinder](#) section of the spring penetrated Simpson's face, lodging in his sinus cavity and brain.

Simpson claims that a manufacturing defect caused his accident. A rivet inside the spring failed due to an inherent weakness, Simpson contends, resulting in the high-speed detonation of the device and his injury. Simpson sued the spring manufacturer (defendant Stabilus, Inc.), the manufacturer of the rack (defendant Keener Corporation), GM, and several other entities involved the rack's design and distribution.

All defendants brought motions for summary disposition. Some were granted, and some were denied. We granted leave to consider a host of legal issues raised in the motions. Simpson cross-appealed a ruling denying a discovery sanction, adding to the number of questions presented.

We affirm the circuit court's rulings as to defendant Stabilus and the discovery sanction, reverse as to defendants Keener and JWF, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS

A. THE RACK AND GAS SPRING

Trask Simpson was employed by Dort Steel as a welder. Dort repaired or salvaged large metal racks in which GM stored and transported auto parts, such as bumpers. Dort employees either fixed broken racks delivered by GM, or disassembled them for reuse of their parts.

The rack involved in this case was a large metal container that was open in the front, had two lateral walls called sidewalls, and a rear wall called a T-bar. It arrived at Dort in a collapsed condition, with the three walls folded down to the rack's floor. The two sidewalls weighed approximately 90 pounds each. Gas springs manufactured by Stabilus assisted in lifting them into position. Once the two sidewalls were raised, the rear wall could be fastened in place.

Here is a photograph of the rack in the fully open position; the rear wall is in the foreground:



The inserts magnify the gas springs and the smaller red circles indicate their positions on the rack's sidewalls.

Gas springs are common, everyday products. They are found on the tailgates and hoods of cars, where they facilitate the upward movement of heavy metal. Underneath an office chair a gas spring dampens movement, preventing the seat from slamming down when someone sits on it. Gas springs have different sizes, strengths, and uses, but they all work by storing and releasing energy.

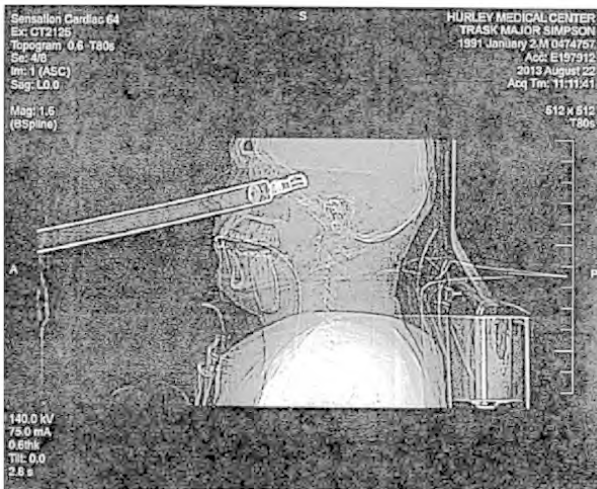
Gas springs consist of two primary components: a rod and a **cylinder**. The spring depicted on the left in the above photo is the spring that exploded; only the rod end remained in place. The spring on the right is fully extended, and both the rod and **cylinder** are intact.

***2** A gas spring's function depends on a transfer of pressure within the spring itself. A metal tube, called the cylinder, holds pressurized nitrogen gas. A rod with a piston at the end fits into the cylinder. The rod end of the **cylinder** contains seals that glide along the rod and help guide it. As the spring is extended, motion of the piston along the rod allows the gas to flow from one end of the spring to the other. The pressure differential created by movement of the piston generates a force that helps raise a heavy object.

The piston's position on the rod is maintained by the seals and washers and, ultimately, by a single rivet. The rivet is at the center of plaintiff's claims in this case. According to plaintiff, the gas spring that injured Simpson separated because the rivet head failed. That failure, plaintiff posits, was due to a manufacturing defect. The rivet head in the spring that injured Simpson was a "bad apple," plaintiff maintains.

B. THE ACCIDENT

When the rack in the photograph was delivered to Dort, Simpson inspected it and decided to spot-weld a portion of the floor. As he started to raise the left side-wall, the gas spring blew apart. Propelled by the high-pressure nitrogen gas, the **cylinder** flew through the air and lodged in Simpson's face, penetrating his sinus and brain. The rod end of the spring remained attached to the rack. Here is a radiologic image obtained at the hospital where Simpson was taken, showing the **cylinder** embedded in his head:





Simpson died in August 2018, five years after the accident. Before his death, Simpson sued a number of entities that he alleged were involved in the manufacture, distribution, and use of the gas spring. Pertinent here, the defendants were: GM; Gonzalez Contract Services (the designer of the rack); Keener Corporation (the manufacturer of the rack); JWF Technologies (the supplier of the gas spring), and Stabilus, Inc. (the manufacturer of the gas spring). Simpson's claims sounded in negligence and product liability.

The parties engaged in extensive discovery. More than two dozen depositions were taken. Jointly, the parties performed testing on the cylinder end of the spring and on exemplar springs. Dort apparently lost or destroyed the rod end of the spring that injured Simpson. A number of engineering experts provided depositions regarding the cause of the spring's separation.

The experts agreed (and Simpson does not contest) that the spring had been misused at GM before it arrived at Dort. Specifically, the evidence established that the spring had been overextended at least once, and possibly many times. According to several of the expert witnesses, overextension precipitated a failure of the rivet head. When Simpson began to raise the sidewall, the defective rivet head allowed an instantaneous transfer of high-pressure gas, violently pushing the two components of the spring apart. As Dr. Stephen Batzer, defendant Keener's engineering expert put it: "if the rivet fails and the other components of the piston assembly are then free on the ... rod end, pressure inside of the cylinder will cause the cylinder and rod to separate under force, and if they're not captured by their mounting points there will be ... a rocket."

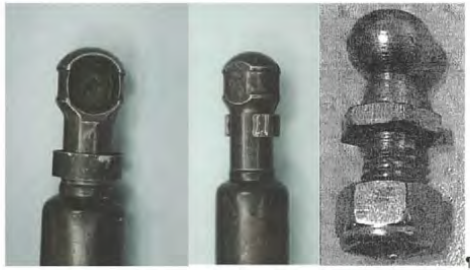
All of the defendants brought motions for summary disposition under [MCR 2.116\(C\)\(10\)](#). Simpson orally moved the court to impose a discovery sanction against JWF arising from JWF's alleged failure to timely supplement its discovery responses. The circuit court granted summary disposition to Keener, but denied summary disposition to GM, Gonzalez, Stabilus, and JWF. The court also denied Simpson's discovery sanction motion. GM and Gonzalez have settled with Simpson. Stabilus and JWF now appeal by leave granted; Simpson cross-appeals the dismissal of Keener and the denial of sanctions.

***3** We turn to a deeper discussion of the evidence and the claims on appeal, which we address party-by-party. Our review of the evidence conforms to the rules governing summary disposition. We have considered the circuit court's summary disposition decisions de novo by familiarizing ourselves with the pleadings, admissions, affidavits, and other record documentary evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v. Taylor*, 263 Mich. App. 618, 621; 689 N.W.2d 506 (2004). When the record has left open an issue on which reasonable minds could differ, we have concluded that a genuine issue of material fact exists, precluding summary disposition.  *West v. Gen Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). Our review has also been guided by the principle that "[e]ven where the evidentiary facts are undisputed, it is improper to decide the matter as one of law if a jury could draw conflicting inferences from the evidentiary facts and thereby reach differing conclusions as to ultimate facts."  *Nichol v. Billot*, 406 Mich. 284, 301-302, 279 N.W.2d 761 (1979) (citations omitted).

II. STABILUS

Stabilus manufactures a wide variety of gas springs of different lengths and pressures, and designed for use in diverse applications. Some are "off the shelf" products. Others, such as the spring involved in this case, are custom-made. According to James Kull, Stabilus's Director of Industrial Applications Engineering, the subject spring was "a custom product" manufactured for defendant JWF, with "a certain length, a certain stroke, a certain force, and end fitting connections."

Defendant Gonzalez designed the GM rack. The rack's design included two Stabilus springs, one mounted to each sidewall. A ball stud system (the "end fitting connections" referred to by Kull) attached the springs to the sidewalls. The springs selected for incorporation in the GM racks were manufactured with a ball cup, also called a "socket," at each end. The ball cup was intended to couple with the ball stud—a spherical head on a shank, affixed to the rack. The ball studs used on the GM racks were selected by defendant Gonzalez, and conformed to Stabilus's specifications. Here are photographs depicting the ball stud and a ball socket system. From left to right, the first two photos show the socket; the second depicts the clip, discussed below. The third photo is of a ball socket. The photo at the bottom of the display shows a spring's socket attached to a ball stud:



Clips on the ball sockets helped keep the balls and cups together. According to Stabilus's instructions, before freeing the spring from its attachment points, the clips would first be removed with a screwdriver. The evidence supports that when Simpson began working on the rack, the clip on the left spring's ball socket had already been removed. Simpson denied having removed the clip. Nevertheless, the ball apparently remained within the ball cup until the spring separated.¹

According to James Mattice, a forensic engineer retained by Dort, the spring blew apart due to a failure of the rivet head holding the piston components in place, likely precipitated by overextension of the spring: "I believe at some point the gas spring was loaded in tension or overextended which resulted in its failure.... I believe at some point, yes, the rivet failed." In Mattice's estimation, the rivet failure occurred before the rack arrived at Dort. Mattice tested four exemplar gas springs in his laboratory to determine the amount of force required to

fail their rivet heads. His testing revealed that when extended in an axial direction, the rivet heads maintained their function until the load reached approximately 2,000 pounds. When the spring was overextended by .11 to .13 inches, its components would "start breaking up." C. Michael Dickinson, an engineer retained by GM, agreed that the spring separated because "[t]he rivet apparently failed."

*4 Glenn Akhavein, an engineering expert retained by Simpson, concurred that the rivet head's failure caused the spring to separate:

This style of gas spring is held together by a rivet head, which had been damaged while at the GM facility due to over extension of the gas spring. When Mr. Simpson started lifting the left side rail the cylinder end of the gas spring (the end that rotates upwards while the side rail is lifted), came off of its ball stud and due to the damage that had taken place at GM it did not extend slowly but instead flew off with enough velocity to penetrate deeply into Mr. Simpson's head.

His testing of exemplar springs demonstrated that the rivet head held until at least 1,500 pounds of force were applied. To generate the force necessary to separate his exemplar springs, Akhavein pulled on them by attaching them to his Chevrolet Suburban vehicle.

James Kull, Stabilus's engineering representative, admitted that the evidence supported that the rivet head failed, and that this failure caused the spring to come apart. Kull explained that the rivet is the only part of the spring's inner workings that retains the piston components on the rod. According to Kull, the spring was designed so that the rivet head would *withstand* overextension. Kull testified that the ball stud is supposed to shear before the rivet head fails, with the ball stud functioning as a "fuse." After examining a CT scan of the internal components of the failed spring, which displayed distortions of the washers holding the piston in place and an absence of the rivet head, Kull expounded:

A. [T]he way we designed this is the ball stud is designed to shear at a force much lower than this. So to apply a

longitudinal load through the ball stud, you're going to break the ball stud prior to that, you know, just by our strength of materials. *So the ball stud will shear before that in this type of connection.* We have a 10-millimeter ball stud on that metal connection. That is the, say, like the fuse or what would break before I would expect to see, you know, piston ... incident.

Q. Just for the record, there's a ball stud at the top of the gas spring and a ball stud at the bottom?

A. Yes.

Q. And if I understand what you're telling me is that, in the event that there's an excessive longitudinal force ... like, force along the long axis of the spring.

A. Exactly. Yes.

Q. If we have excessive force on the long axis of the gas spring, the ball spring is intended to fail first?

A. That is correct, yes.

Q. And that would be where it's next down to the attachment point where you bolt it on to whatever you're attaching it to?

A. Exactly. Yes. [Emphasis added.]

In his 28 years with Stabilus, Kull asserted, he had never seen a gas spring separation like this one.

Dickinson, the engineer retained by GM, agreed that the ball stud was supposed to fail before the rivet head. In his view as well as Kull's, overextension of the spring should have tripped the ball stud connection. Had this happened, the spring would have fallen off the rack. "A 13-millimeter nominally grade-2 fastener [used in this case] is such that if you put a pure axial tensile load on the strut [spring], you will significantly deform and/or break the ball stud before you fail the internal components of the strut." He continued:

*5 First let me say my understanding is it's Mr. Kull's testimony that says the ball studs are to act as a fuse and that they should break prior to a separation failure of the strut. I believe that that's correct and I believe that this was probably designed that way, which makes the failure of the strut through whichever mechanism or combination even more mysterious because we didn't fail these ball studs, and to my knowledge there's nothing magical about the ball

studs on the accident rack. They're just grade 2 HS135's or whatever, right? That's just garden variety grade-2 steel.

If we had a high-load quasi-static potential load applied sufficient to fail the rack, the rivet head as it was done in the lab tests, ... the ball studs would have failed or broken or bent before that.

He added, "So if you somehow put 1,000-pound highly dynamic load on that system, I would still expect the ball studs to go first."

Dickinson, too, tested exemplar springs and ball studs. His testing revealed that the ball studs began to exhibit signs of failure, including bending, when between 800 and 1,000 pounds of force was applied. Examination of photographs of the ball studs involved in Simpson's accident revealed no evidence of failure, however: "I would expect to see bending of that ball stud in those photos, and I don't. And you certainly don't see bending like that." He agreed that the rivet head in this case "would have failed below 800 pounds" if the overextension was purely axial "and all other things are out of play, there's no heating, there's no prior damage on the inside, there's no fatigue, crack growth that predated this" And based on his examination of the involved spring, Dickinson concluded that it was subjected to "primarily axial tension."

No evidence produced by any party suggested that the ball studs deformed or broke before the spring exploded. Instead, the evidence summarized above substantiates that the rivet head failed first. And according to Akhavein, "[i]f the rivet head doesn't fail you don't get separation between the two components." Had the rivet head continued to function despite the overextension, "then it's going to act just like it always does; the ball stud breaks and from whatever position this is compressed, it's going to slowly expand." Further questioning reinforced this point:

Q. Simply put, my question is this. What would have happened if the rivet head did not fail?

A. The gas spring would have extended to its full extent and then stopped.

Q. If the rivet head had not failed would there have been an injury to Trask?

A. I don't believe so.

In Akhavein's view, either the spring was not designed with a strong enough rivet head, or it was "manufactured in a manner

that resulted in a product that didn't meet design intent.” As discussed in more detail below, plaintiff has elected to confine his claim against Stabilus to a manufacturing defect.

When discovery concluded, Stabilus moved for summary disposition, presenting three arguments. Stabilus first contended that as the manufacturer of a component part, it bore no responsibility “for the use of the gas spring within the application in question.” Further, Stabilus asserted, the gas spring was misused. Under [MCL 600.2947\(2\)](#), Stabilus continued, it was not liable for the consequences of misuse unless the misuse was reasonably foreseeable. Here, Stabilus claimed, the misuse of the racks was unforeseeable. Stabilus also challenged plaintiff's defective design claim.

In response, plaintiff abandoned all previously pleaded design defect claims raised against Stabilus and limited his legal argument to “a manufacturing defect.” The court denied Stabilus's initial motion. Following oral argument, the circuit court permitted Stabilus to refile its motion for summary disposition. In its renewed motion, Stabilus contended that no evidence supported that the gas spring was defectively manufactured.

*6 At hearings conducted on the various defendants' motions for summary disposition, plaintiff's counsel declared:

This is a products liability action and they are talking about alternative design, underlying design. There is nothing wrong with the design of this gas spring. It is a manufacturing defect. The gas spring did not comply to the design of the gas spring itself. As the defense counsel for Stabilus indicated, there is a design criteria of the gas spring in which the rivet will be stronger than the ball stud. So in other words, if there is going to be an overextension, the overextension will break the ball stem, but the rivet will stay in place. The reason that's the distinction is, that prevents an explosion. So, the issue again is not alternative design

Plaintiff disputed that Stabilus supplied merely a “component,” highlighting that the spring was a completed product used in conjunction with another product. Counsel analogized, “Stabilus'[s] claim of lacking responsibility for a component part is as if a manufacturer of a tire claims it has no liability for tire defects because it didn't know if it was going to be used on a Chevrolet or a Buick.” Misuse of the spring was foreseeable, counsel urged.




The circuit court ruled that an issue of fact precluded summary disposition of plaintiff's defective manufacturing claim. As to the foreseeability of misuse of the spring, the court stated:


Plaintiff argues that this misuse was clearly foreseeable because Stabilus had accounted for overextension and excess force on the gas spring in their design criteria. And if this safety mechanism that was meant to prevent harm came out of - - coming out of misuse failed, then it seems clear that Stabilus foresaw the misuse of the spring and designed it accordingly. So, I'm going to let a jury decide that and your motion is denied.


On appeal, Stabilus renews most of its arguments. We address each in turn.

A. STABILUS'S LIABILITY AS COMPONENT MANUFACTURER

Stabilus asserts that it had “no duty arising from the application” of its spring in the completed rack, because Michigan law absolves a manufacturer of the responsibility to anticipate how its product might become potentially dangerous when incorporated into a unit designed and manufactured by a different entity. Further, Stabilus contends, plaintiff's experts did not offer any opinions supporting that the spring was defective independent from the ball stud. And because Keener paired the spring and the ball stud, it qualifies as the completed product manufacturer, not Stabilus.

We begin with Stabilus's argument that because it manufactured only the spring itself and not the ball stud, it cannot be held liable for Simpson's injury. Stabilus rests this argument on two cases:  *Childress v. Gresen Mfg Co.*, 888 F.2d 45 (CA 6, 1989), and  *Jordan v. Whiting Corp.*, 49 Mich. App. 481; 212 N.W.2d 324 (1973), rev'd in part on other grounds  396 Mich. 145; 240 N.W.2d 468 (1976).




Childress and *Jordan* are readily distinguishable from this case. The Sixth Circuit's holding in *Childress* is limited to cases alleging defective design: “[U]nder Michigan law a component part supplier has no duty, independent of the completed product manufacturer, to analyze the design of the completed product which incorporates its *nondefective* component part.”  *Childress*, 888 F2d at 49 (emphasis added). Plaintiff has abandoned a defective design claim and rests its arguments instead on a claim of “defective manufacture” or breach of implied warranty. *Childress* is inapposite.


*7 Nor is *Jordan* helpful to *Stabilus*. There, too, this Court limited a manufacturer's duty when the component parts its supplies were “not in and of themselves dangerous or defective[.]”  *Jordan*, 49 Mich. App. at 486. Like *Childress*, the plaintiff's claims in *Jordan* did not involve an allegedly defective part. This is a critical distinction; neither case addresses the duty of a component manufacturer to produce a nondefective part. “Component manufacturers should be summarily dismissed from litigation if the component product is defect-free.” Cardelli & Cardelli, *Product Liability Relief for Component Manufacturers*, 69 Mich. BJ 812, 814 (1990). The opposite proposition is equally true and applies here: when evidence supports that a component harbors a dangerous defect, summary disposition is improper.

Moreover, Michigan's product liability act specifically recognizes that a component manufacturer may bear liability for a defectively manufactured product. The act, MCL 600.2945 *et seq.*, defines a “product liability action” as “an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.” MCL 600.2945(h). A “product” “includes any and all component parts to a product.” This language signals that the Legislature did not intend that component-part manufacturers would be exempt from tort liability based merely on their status as component-part manufacturers. Rather, the component-parts doctrine is a common-law defense applicable in certain product liability actions. It is not a form of blanket immunity for a defectively manufactured part that happens to have been integrated within a larger product.

Assuming that the component-parts doctrine remains viable despite the enactment of the product liability act, we highlight

that it embodies a *policy* determination. At its core, this common-law concept holds that component manufacturers should not be required to obtain and review the design of a completed product to independently assess whether a component will function safely and as intended. “For example, to borrow the *Childress* facts, if a valve has many applications and is dangerous only when another company uses it in a log-splitter, then it is difficult to argue that the valve supplier ‘created’ the risk; rather, it appears that the manufacturer of the log-splitter did.” Mansfield, *Reflections on Current Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement*, 84 Ky LJ 221, 240 (1996). But the doctrine has never been applied in a case resting on a defective manufacturing theory, and for good reason.

When a component has been defectively manufactured, its integration into a larger or more complex product should not automatically eliminate its manufacturer's liability. “[A] manufacturer of a component part clearly is liable for injuries caused by a component that was defective or unreasonably dangerous at the time it left the control of the manufacturer.”  *Davis v. Komatsu America Indus Corp*, 42 SW3d 34, 42 (Tenn, 2001). The Wisconsin Supreme Court has explained that “[i]ntegration into another product does not shift responsibility from the manufacturer of a defective component to another party ‘who [is] in no position to detect the hidden defect.’ ”  *Godoy ex rel Gramling v. EI du Pont de Nemours & Co.*, 319 Wis 2d 91, 120-121; 768 NW2d 674 (2009), quoting  *City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis 2d 641, 649-650; 207 N.W.2d 866 (1973). Logically, it follows that the component parts doctrine cannot apply in a case premised *solely* on a defective manufacturing claim.

*8 Simpson was injured by the failure of the gas spring. Although the gas spring was a component of the rack, plaintiff's claims against *Stabilus* center on the injury “caused by or resulting from the production of” the gas spring itself. The rack did not fail; the spring did. A component manufacturer has no liability when the manufacturer of a completed product integrates the component in an unsafe or unforeseen manner.  *Portelli v. IR Constr Prods Co., Inc.*, 218 Mich. App. 591, 603-604; 554 N.W.2d 591 (1996). However, a component manufacturer is subject to liability when its “product,” defined by the act to specifically include components, is incorporated in a foreseeable way and fails due to inherent defects. Here, the spring functioned separately

from the rack and had a separate purpose. We discern no policy basis for imposing the component-parts doctrine to these facts.

Moreover, the evidence substantiates that Stabilus knew that its springs could be used in applications identical or substantially similar to the rack, and has raised no claim that the nature or characteristics of the spring were changed by its incorporation. Because plaintiff alleges that the spring itself was defective and evidence supports that claim, the component-parts doctrine does not absolve Stabilus of liability.

B. EVIDENCE THAT THE SPRING WAS DEFECTIVE

Stabilus next posits that it cannot be held liable for any injury caused by the spring because “[p]laintiff’s experts did not offer any opinion that the gas spring—independent from any ball stud—was defective.” We do not interpret the law or the evidence in so limited a fashion.

Stabilus manufactured the spring at issue with sockets at both ends. Kull’s testimony supports that Stabilus knew and intended that the spring would be coupled with ball studs. No evidence of record suggests that the ball studs used in this case were defective, or differed from the ball studs that Stabilus anticipated would be paired with its spring. Rather, Kull testified that “the way we designed [the gas spring] is the ball stud is designed to shear at a force much lower than this So the ball stud will shear before that in this type of connection.” With regard to the specific spring involved here, Kull continued, “[w]e have a 10-millimeter ball stud on that metal connection. That is the, say, like the fuse or what would break before I would expect to see, you know, piston ... incident.” He clarified by concurring that “[i]f we have excessive force on the long axis of the gas spring, the ball stud is intended to fail first[.]” Based on this testimony, Akhavein opined that the rivet “did not meet design intent”:

Q. So if the design intent is not to have the rivet fail first but rather the ball stud, if you have a situation like this where the rivet head does fail first, do you have an opinion as to whether or not it has met the design criteria?

A. Oh, this is about as straightforward it gets [sic]. It’s supposed to act like this and it acted like this. It absolutely didn’t meet the design criteria.



Q. If it didn’t meet the design criteria, do you have an opinion whether or not it was manufactured in a way that did not comply with the design criteria?



A. If we are talking - - well, the end product was manufactured in a manner that resulted in a product that didn’t meet design intent.

He later elucidated that this testimony meant that there was a manufacturing defect, “based upon the fact that it didn’t meet the design intent.”²

*9 This testimony creates a reasonable inference that the spring behaved in an unexpected and defective manner, as it broke apart despite that the cylinder also came loose from the ball stud. Stabilus accurately points out that when answering a different question posed during his 359-page deposition, Akhavein denied the existence of a manufacturing defect. We must view the evidence in the light most favorable to plaintiff, however, and when considered through that lens, Akhavein corrected his previous testimony when given an opportunity later in the deposition.

And we would find that plaintiff has established a question of fact regarding his defective manufacturing claim regardless of



Akhavein’s testimony. In  *Holloway v. Gen Motors Corp. (On Rehearing)*, 403 Mich. 614, 618; 271 N.W.2d 777 (1978), our Supreme Court held that “a plaintiff may establish by circumstantial as well as direct evidence that there was a defect in the product when it left the manufacturer.” *Holloway* is analogous to this case. The issue presented there was “whether the ball joint assembly of” the plaintiff’s car failed while the car was being driven, or after the car “hit a ditch and then a utility pole.”  *Id.* at 620. The evidence established that “the break in the ball joint assembly was fresh, metallurgically clean, and due to an impact failure.”

 *Id.* at 624. This finding negated that the car had been improperly maintained or misused. The Supreme Court concluded, “We are left with a reasonable probability that something was inherently wrong with the ball joint assembly such that it was unable to withstand an impact it should have withstood.”  *Id.* at 625.

Here, multiple experts testified that the rivet head failed unexpectedly. Their testimony was based on meticulous examinations of the [cylinder](#) and its internal components. Several of the experts testified that despite overextension of

the spring, according to Stabilus's design criteria the ball stud should have failed before the rivet head. Furthermore, the exemplar springs failed only after being subjected to an enormous amount of force, far more than could be generated by a worker raising or lowering a rack's sidewall.

Despite this evidence, Stabilus insists that plaintiff cannot pursue a claim for defective manufacture without presenting positive proof that the rivet defect was present when the spring left Stabilus's control. Again, we do not accept Stabilus's interpretation of the governing law.


A manufacturing defect claim focuses on whether a product deviated from its intended condition when placed in the stream of commerce. See  *Prentis v. Yale Mfg Co.*, 421 Mich. 670, 683; 365 N.W.2d 176 (1984) (“As a term of art, ‘defective’ gives little difficulty when something goes wrong in the manufacturing process and the product is not in its intended condition. In the case of a ‘manufacturing defect,’ the product may be evaluated against the manufacturer's own production standards, as manifested by that manufacturer's other like products.”). Stabilus contends that no evidence supports that the spring was defective when it was sold to JWF, and therefore plaintiff failed to establish a necessary element of a product liability claim under  MCL 600.2946(2). In relevant part this subsection provides:




In a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller is not liable unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating

equal or greater risk of harm to others....


*10 Viewed in the light most favorable to plaintiff, a jury could reasonably conclude that when the spring left Stabilus's control, the rivet head was incapable of withstanding a foreseeable overextension of the spring. This evidence supports two reasonable and interrelated inferences. The first is that the defect was attributable to Stabilus's failure to manufacture the rivet head to its own specifications. Second, Kull's testimony that the ball stud was intended to function as a “fuse” supports a reasonable inference that the rivet head's failure occurred because it was not able to withstand a predictable force.



Plaintiff refers to this claim variously as one of “negligent manufacture” or breach of implied warranty. The two theories of liability are closely related, but not necessarily identical.

See  *Prentis*, 421 Mich. at 692 (“We recognize that the negligence theory generally focuses on the defendant's conduct, requiring a showing that it was unreasonable, while warranty generally focuses upon the fitness of the product, irrespective of the defendant's conduct.”); *Lagalo v. Allied Corp.*, 457 Mich. 278, 287-288; 577 N.W.2d 462 (1998) (“The jury may have concluded that the implied warranty was not breached, in light of the period during which Mr. Lagalo could have obtained a second repair in safety; at the same time, the jury may have been satisfied that the failure of the product reflected a failure to manufacture the product in a reasonable manner.”). In this case, regardless of the name plaintiff attached to the claim, Michigan law has long established that a manufacturer's sale of a defective product is actionable even absent specific evidence of negligence in the manufacturing process.


In  *Caldwell v. Fox*, 394 Mich. 401; 231 N.W.2d 46 (1975), the plaintiff's vehicle was struck by a car driven by defendant Fox. Fox claimed that his brake system was defective; an automobile dealer and General Motors were added to the suit as third-party defendants.  *Id.* at 405. The third-party complaint stated claims for negligence and breach of warranty.  *Id.* at 406. The circuit court dismissed the claims against the third-party defendants finding “ ‘no proof of a manufacturing defect by the third-party defendant,’ ” and defendant Fox appealed a jury verdict holding him liable for the plaintiff's injuries. *Id.* The Supreme Court held that the

circuit court erred by dismissing the third-party defendants, as circumstantial evidence supported that the brake system was defective when it left the third-party defendant's control. Immediately after the accident, Fox saw brake fluid on the fender wall, and discerned that the connection between the


master cylinder and the brake line was loose.  *Id.* at 408. He later took the car to the dealership, where a general manager documented that the vehicle “ ‘became defective sometime between the delivery date ... and the date of the accident.’ ”


 *Id.* at 409. Fox's testimony, the Supreme Court determined, supplied evidence of a brake system malfunction. More specificity was unnecessary, as “[i]t is within the province of the jury to infer the existence of a defective condition from circumstantial evidence alone; there is no requirement that the actual defect need be proven.”  *Id.* at 410. The Court additionally pointed out:

The Foxes had purchased the car only five weeks before the accident and there was no evidence that the brake system had been tampered with prior to the accident. This evidence is sufficient for a jury to infer reasonably that the brakes were defective from the


time they left the manufacturer. [ *Id.* at 411.]

The Supreme Court's opinion in *Caldwell* preceded the adoption of the product liability act. But like other panels of this Court, we find that the act did not change the fundamental character of a manufacturing defect claim. In

 *Bouverette v. Westinghouse Elec Corp.*, 245 Mich App 391, 396; 628 N.W.2d 86 (2001), this Court characterized the salient issue in an implied warranty case predicated on a manufacturing defect as follows: “When a products liability action is premised on a breach of implied warranty of fitness, the plaintiff must prove that a defect existed at the time the product left the defendant's control, which is normally framed in terms of whether the product was reasonably fit for its intended, anticipated or reasonably foreseeable use.” (Quotation marks and citations omitted.)

Similarly, in  *Kenkel v. Stanley Works*, 256 Mich. App. 548, 558; 665 N.W.2d 490 (2003), this Court explained that “[a] demonstrable malfunction is generally clear evidence

of a defect Additionally, it is within the province of the jury to infer the existence of a defective condition from circumstantial evidence alone” (Quotation marks and citation omitted, ellipses in original.)

*11 The circumstantial evidence and expert testimony in this record create a question of fact regarding whether the rivet head was reasonably safe when it left Stabilus's control. No evidence supports that the rivet head had been altered or modified between the time it left Stabilus's control and the accident. Moreover, the rivet head was within a sealed steel compartment. “Where a failure is caused by a defect in a relatively inaccessible part integral to the structure of the automobile not generally required to be repaired, replaced or maintained, it may be reasonable, absent misuse, to infer that the defect is attributable to the manufacturer.”  *Holloway*, 403 Mich. at 624. Several expert witnesses testified that the rivet head did not perform as anticipated based on the fact that it gave way despite that the spring also disconnected from the ball stud. Further, the evidence supported a reasonable inference that the spring's failure occurred under a load of substantially less than 1,200 pounds, as at that level of force, the ball studs would have deformed. The circuit court did not err by denying summary disposition on this ground.

C. MISUSE

Stabilus finally contends that no evidence supports that the misuse of the spring, likely by GM employees, was foreseeable to Stabilus. Under the product liability act, “[a] manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.” MCL 600.2947(2). The circuit court ruled on this issue as follows:

Plaintiff argues that this misuse was clearly foreseeable because Stabilus had accounted for overextension and excess force on the gas spring in their design criteria. And if this safety mechanism that was meant to prevent harm came out of - - coming out of misuse failed, then *it seems clear that Stabilus foresaw the misuse of*

the spring and designed it accordingly.
So, I'm going to let a jury decide that
and your motion is denied. [Emphasis
added.]

Although the court's reference to "the jury" is somewhat confusing, Stabilus concedes in its brief on appeal that the circuit court concluded that the misuse was foreseeable. According to Stabilus, this was clear error for two reasons. First, Stabilus contends that the evidence simply does not support that overextension of the spring was foreseeable. Second, Stabilus points out, the circuit court apparently rendered its ruling under the mistaken belief that plaintiff's case centered on a design defect theory.

"Clear error exists when some evidence supports the circuit court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the circuit court made a mistake." *Hills & Dales Gen Hosp v. Pantig*, 295 Mich. App. 14, 19; 812 N.W.2d 793 (2011). We reject Stabilus's argument that the record is devoid of evidence of the foreseeability of misuse. Kull's testimony supports that Stabilus knew that overextension of its gas spring could occur, and anticipated that the ball stud connection would fail before the rivet head did. Nor has Stabilus explained why the rivet head's failure was unforeseeable under defective manufacturing theory. The circuit court's ruling conformed with the evidence, and renders Stabilus's misuse arguments meritless.

III. JWF

The circuit court also denied summary disposition to defendant JWF, and we granted leave to appeal. *Simpson v. Gen Motors, LLC*, unpublished order of the Court of Appeals, entered March 8, 2018 (Docket No. 342291). JWF contends that because it did not design or manufacture the gas spring but merely supplied it to Keener for incorporation in the rack, it cannot be held liable for Simpson's injury. Further, JWF insists, GM's misuse of the rack negates any proximate cause.

Plaintiff contends that it need not prove that JWF was negligent. The gas spring left JWF with a defective part inside, plaintiff insists, and JWF placed that defective part into the stream of commerce. JWF acknowledged that the misuse of the spring through overextension was foreseeable.

Therefore, plaintiff reasons, JWF also bears liability for the defectively manufactured spring.

*12 The circuit court denied summary disposition to JWF based on evidence suggesting that JWF had conducted a simulation that assisted Gonzalez in the selection of the specific gas spring incorporated in the rack. This act, however, does not subject JWF to liability under a defective manufacturing theory.

MCL 600.2947(6) governs the liability of a nonmanufacturing seller in a breach of implied warranty case. This section of the product liability act provides:

In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

- (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.
- (b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm. [MCL 600.2947(6).]

In *Curry v. Meijer, Inc.*, 286 Mich. App. 586, 592; 780 N.W.2d 603 (2009), this Court held that in an action against a nonmanufacturing seller, the plain language of subsection (a) requires a plaintiff to present evidence of a failure to "exercise reasonable care." "While subsection (a) contains the clause, 'including breach of any implied warranty,' " the Court explained, "the grammatical context and placement of this clause indicate that the Legislature did not intend to create a third avenue of liability." *Id.* In other words, under this part of the product liability act, "a breach of implied warranty claim is a type of, and not separate from, a breach of reasonable care claim." *Id.* at 594.³

Plaintiff presented no evidence that JWF failed to exercise reasonable care. The essence of plaintiff's claim regarding the spring is that it harbored an intrinsic fault due to a manufacturing defect traceable to Stabilus. No evidence supports that JWF supplied an incorrect spring, or that JWF had reason to know that the spring was or might be defective. And plaintiff presented no evidence that JWF negligently participated in the decision-making process that resulted in the selection of the particular model of gas spring used in the

GM rack. Even if we were to accept that JWF conducted the simulation negligently, plaintiff has not explained how that negligence proximately caused Simpson's injury. Because this Court's decision in *Curry* controls plaintiff's claims against JWF, the circuit court erred in denying JWF's motion for summary disposition.

"Where a mechanical die had been successfully used for five years without incident before injury, the risk of injury was unforeseeable as a matter of law."

IV. KEENER

A. THE PROCEDURAL BACKGROUND

Defendant Keener, the manufacturer and seller of the completed rack, also sought summary disposition. Keener filed its motion under [MCR 2.116\(C\)\(10\)](#), asserting that no evidence supported a claim against it premised on theories of either defective design or defective manufacture. Plaintiff's response centered on those arguments. Plaintiff contended that because Keener was "the ultimate manufacturer," it could not avoid liability for the defective spring "under the Products Liability Statute or *Comstock*," and an "implied warranty" theory.

At the argument on Keener's motion, plaintiff's counsel stressed that "this is not a design defect case," but rather involved "manufacturing defects" and breach of implied warranty. Counsel added, "no comment was made about the breach of expressed warranty. There was an expressed warranty that this would be free of defect. It follows through to the plaintiff the expressed warranty that has been given." Keener's counsel did not offer a rejoinder to plaintiff's express warranty argument.


*13 The circuit court articulated that "nobody showed that Keener designed or built a defective container."⁴ Additionally, the circuit court ruled, the "three-year gap" between the rack's manufacture and the accident "is too great to say that it's Keener's problem, so they're out." The court reasoned:

This particular rack was used for three years. And the testimony by the various witnesses says the damage to the container was not done by Keener. That's pretty important to this Court.

And somewhere I read the *Davis [v.] Link* case it says:

We had three years here. I think that same logic applies.

Plaintiff's counsel reminded the court of the express and implied warranty claims, and the court responded, "I don't care whether it was expressed or implied. Keener's motion is granted."

Keener submitted a proposed order dismissing the case against it in its entirety. Plaintiff objected to the order, asserting that Keener's summary disposition motion had not addressed the implied and express warranty claims. Therefore, plaintiff contended, the order should have dismissed only the claims brought under  [MCL 600.2946\(2\)](#). Keener asserted that the order accurately recapitulated the court's oral ruling, and that plaintiff's motion actually sought reconsideration rather than correction of the proposed order. And plaintiff never pleaded claims of implied or express warranty, Keener claimed.

In response, plaintiff presented several pages of the second amended complaint invoking implied or express warranty claims. At the hearing, the court rejected plaintiff's arguments, stating, "The Court declares that it's [sic] intent was to remove Keener from this case in all respects." Plaintiff has cross-appealed this ruling.

B. THE SECOND AMENDED COMPLAINT AND KEENER'S MOTION FOR SUMMARY DISPOSITION

Plaintiff's second amended complaint spanned 68 pages and set forth 353 numbered paragraphs. The first 72 paragraphs fell under the heading "General Allegations." The remaining paragraphs described additional claims against each individual defendant. Relevant here are the following paragraphs applicable to all defendants:

57. The Defendants breached its [sic] implied warranty with respect to the container.

58. Upon information and belief, Defendants made an expressed warranty as to the container.

* * *

67. The Defendants' [sic] breached its [sic] implied and/or expressed warranties regarding the frame and that such was a proximate cause of Plaintiff's injuries and damages as heretofore alleged.

* * *



72. Plaintiff sustained injuries and damages which were a proximate result of:

* * *

e. Defendants' breach of expressed and implied warranties.

C. ANALYSIS

Keener's motion for summary disposition did not mention plaintiff's express warranty theory. Nor does the record reflect that Keener ever filed a motion under [MCR 2.116\(C\)\(8\)](#) or seeking a more definite statement related to plaintiff's warranty claims. On appeal, plaintiff asserts that the circuit court improperly granted summary disposition of Simpson's express warranty claim because Keener's initial motion for summary disposition did not address it. Plaintiff is correct.


***14** A complaint must contain “[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend” [MCR 2.111\(B\)\(1\)](#). “[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.”  [Stanke v. State Farm Mut Auto Ins. Co.](#), 200 Mich. App. 307, 317; 503 N.W.2d 758 (1993), citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. Our Supreme Court has characterized [MCR 2.111\(B\)\(1\)](#) as consistent with a “notice pleading environment.”  [Roberts v. Mecosta Co Gen Hosp \(After Remand\)](#), 470 Mich. 679, 700 n 17, 684 N.W.2d 711 (2004). “[N]otice pleading and key documents are typically sufficient to survive summary disposition under [MCR 2.116\(C\)\(8\)](#),” as the plaintiff will generally not have all the evidence available when filing the




complaint. [Tomasik v. Michigan](#), 327 Mich. App. 660, 667; — N.W.2d — (2019)— N.W.2d — (2019). If a party fails to plead facts with sufficient detail, the court should permit “the filing of an amended complaint setting forth plaintiff's claims in more specific detail.” [Rose v. Wertheimer](#), 11 Mich. App. 401, 407; 161 N.W.2d 406 (1968); see also [MCR 2.116\(I\)\(5\)](#).

Plaintiff's second amended complaint adequately set forth a claim for breach of an express warranty. In three different places in the complaint, plaintiff invoked an express warranty theory. While plaintiff's pleading regarding this theory was not particularly detailed or specific, it sufficed to afford Keener with notice that an express warranty claim would be pursued.


What is required of pleadings in modern times is no more than reasonable notice of the claims made, in sufficient detail only that there be no misleading of either party nor a denial to him of information necessary to a fair preparation and presentation of his case. The pleader, in other words, need only apprise plainly the opposite party of the cause of action and the claim of plaintiff. [[Jean v. Hall](#), 364 Mich. 434, 437; 111 N.W.2d 111 (1961) (quotation marks and citation omitted).]

Plaintiff's amended complaint fulfills these requirements.





Accordingly, the circuit court erred by granting summary disposition of plaintiff's express warranty claim. [MCR 2.116\(G\)\(4\)](#) provides that when seeking summary disposition, the moving party must “specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.” [MCR 2.116\(G\)\(3\)](#) compels the moving party to support its motion with affidavits, depositions, or admissions, or other documentary evidence. Only if the moving party complies with [MCR 2.116\(G\)\(3\)](#) does the burden shift to the opposing party to respond.  [Barnard Mfg Co., Inc. v. Gates Performance Engineering, Inc.](#), 285 Mich. App. 362, 370; 775 N.W.2d 618 (2009).



Keener failed to present any argument or evidence supporting that plaintiff's express warranty claim lacked legal or factual merit. In an analogous case,  *Al-Maliki v. LaGrant*, 286 Mich. App. 483, 486; 781 N.W.2d 853 (2009), we highlighted that due process principles compel courts to let a party know that an otherwise unraised issue is on the table for a summary decision. In that case we noted that “the record clearly reveal[ed] that plaintiff had no notice that the causation issue would be raised at the summary disposition motion hearing and rightly should have been surprised by the circuit court's inquiry at the motion hearing regarding causation.”  *Id.* at 487. We concluded that “the basic requirements of notice and a meaningful opportunity to be heard” were unsatisfied, and reversed the grant of summary disposition.  *Id.* at 488. Here, too defendant's summary disposition motion did not challenge one of plaintiff's pleaded claims and plaintiff should not have been required to defend that claim's validity at the hearing. MCR 2.116(G)(4).


Therefore, we must vacate the circuit court's order granting summary disposition of plaintiff's express warranty claim, and remand for further proceedings in this regard. If Keener intends to seek summary disposition based on an express warranty theory, Keener must file an appropriate summary disposition motion under MCR 2.116(C)(10), identifying the legal issue on which it seeks summary disposition, and the evidence supporting its argument. To assist the court on remand, we provide the following guidance regarding plaintiff's express warranty claim.

***15** Plaintiff asserts that Keener made an express warranty regarding the rack, specifically that it was “free from defect.”⁵ An express warranty is a representation by a manufacturer or a seller that a product has certain characteristics, or meets certain standards. See  *Curby v. Mastenbrook*, 288 Mich. 676, 679-680; 286 N.W.123 (1939). The product liability act provides that “a seller other than a manufacturer” may bear liability for harm caused by a product if “[t]he seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.” MCL 600.2947(6)(b). Assuming without deciding that Keener did, in fact, expressly warrant the fitness and suitability of the rack, the elements of plaintiff's claim for breach of the warranty include proximate causation: that the failure of the product to meet the express warranty was a

proximate cause of plaintiff's injuries or damages. See M Civ II 25.12.⁶

“Proximate causation involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences[.]” *Jones v. Detroit Med Ctr*, 490 Mich. 960, 960; 806 N.W.2d 304 (2011). An injury is proximately caused by a breach of an express warranty if it is a “natural and probable consequence” of the breach, “which, under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as the result of” the breach. *Nielsen v. Henry H Stevens, Inc.*, 368 Mich. 216, 220-221; 118 N.W.2d 397 (1962). “The question of proximate cause is generally held to be one for the jury. Any doubts about the relations between the causes and the effects should be resolved by the jury. The determination of remoteness should seldom, if ever, be summarily determined.”  *Fiser v. Ann Arbor*, 417 Mich. 461, 475; 339 N.W.2d 413 (1983) (citations omitted), overruled on other grounds by  *Robinson v. Detroit*, 462 Mich. 439, 613 N.W.2d 307 (2000). “Proximate cause is a question for the jury to decide unless reasonable minds could not differ regarding the issue.”  *Lockridge v. Oakwood Hosp*, 285 Mich. App. 678, 684; 777 N.W.2d 511 (2009). “There may be more than one proximate cause of an injury.”  *Allen v. Owens-Corning Fiberglas Corp.*, 225 Mich. App. 397, 401; 571 N.W.2d 530 (1997).

In its summary disposition ruling, the circuit court conflated the foreseeability component of proximate cause with the discussion of foreseeability in  *Davis v. Link*, 195 Mich. App. 70; 489 N.W.2d 103 (1992). *Davis* was a negligence case and involved duty, not proximate cause. “Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences.”  *Moning v. Alfano*, 400 Mich. 425, 438-439; 254 N.W.2d 759 (1977).

The plaintiff in *Davis* was a punch press operator employed at the Whirlpool Corporation and was injured when her hand was caught in the press's pinch point. She brought a product liability claim against the manufacturer of the die used in the press, alleging a failure to design and manufacture the die with sufficient pinch point guarding.  *Davis*, 195 Mich.

App. at 71. “There [was] no allegation that the die itself was defectively designed or manufactured.” *Id.*

This Court affirmed a grant of summary disposition premised on *duty*, and not proximate cause. Citing *Fredericks v. Gen Motors Corp.*, 411 Mich. 712, 720; 311 N.W.2d 725 (1981), we held: “The supplier of a die set to a component manufacturer does not have a duty to place guards on the die set or warn the component manufacturer of hazards attendant in its use.” *Davis*, 195 Mich. App. at 72. The plaintiff argued that despite *Fredericks*, her employer had a statutory duty to maintain workplace safety, and that the die manufacturer should have known that the die would be used in an unsafe manner. We rejected that argument because the plaintiff “failed to present evidence of the manufacturer’s knowledge of unsafe use, and no evidence was presented that unsafe use was foreseeable.” *Id.* Furthermore, “the evidence revealed that the die had been successfully used in the press for four or five years without incident before plaintiff’s injury.” *Id.* Based on these facts, we held that the plaintiff had not established the duty element of a *prima facie* case. *Id.* at 73.

*16 Assuming that an express warranty exists here, duty will not constitute a contested element of plaintiff’s *prima facie* case. “The primary questions in express warranty claims are whether the communication is a warranty, whether its scope covered the characteristic that caused injury, whether it was breached, whether the plaintiff relied, and what harm resulted because the warranty was breached.” 2 Dobbs, Hayden & Bublick, *Torts* (2d ed), § 452, pp 904-905. Dobbs continues, “The fact that the product is not defectively designed or manufactured is irrelevant; the ‘defect’ at issue is its failure to meet the standards expressed in the warranty or representation itself.” *Id.* at 905. See also *Moning*, 400 Mich. at 439 (“It is well established that placing a product on the market creates the requisite relationship between a manufacturer, wholesaler and retailer and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected.”).

Foreseeability comes into play in the sense that plaintiff must establish at trial that Keener’s breach of its warranty was a proximate cause of Trask Simpson’s injury. See *MCL 600.2947(6)(b)* (“[T]he failure to conform to the warranty was a proximate cause of the person’s harm.”). Foreseeability is one aspect of proximate cause, including whether Simpson was “within the foreseeable scope of the risk” created by a

breached warranty. See *Moning*, 400 Mich. at 439. And it has long been the law in this state that “[a] plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that some injury to the defendant was foreseeable or to be anticipated.” *Schultz v. Consumers Power Co.*, 443 Mich. 445, 452-453 n 7; 506 N.W.2d 175 (1993).⁷ If on remand Keener brings a summary disposition motion based on express warranty, we instruct the circuit court to consider these legal precepts.

V. PLAINTIFF’S CROSS-APPEAL

By way of reminder, JWF supplied the Stabilus springs used in the rack that ended up at Dort. Plaintiff claims that JWF used a software analysis program to determine which gas springs should be incorporated in the rack, as well as the number of springs, their mounting locations, and their fastening mechanisms. The evidence supports that Stabilus manufactured the springs used in the GM racks to JWF’s specifications. Gonzalez’s design of the rack contemplated that each sidewall would be raised with one Stabilus spring.

According to the deposition testimony of Dominick DiPilla, JWF’s president and owner, JWF functioned like a “hardware store” with regard to the GM racks, supplying “off the shelf” springs identified by the customer. In a motion for summary disposition JWF averred that it was merely a distributor of the gas spring, and did not manufacture or design the rack. Plaintiff countered with evidence suggesting that JWF played a far more active role in the rack’s design.

*17 Shortly before a scheduled trial date, defendant JWF served plaintiff with documents that it characterized as supplemental discovery. Within those documents was an email authored by Ralph Burns, a JWF salesman, responding to an email sent by Tom Clos, an employee of Gonzalez. Clos asked Burns to address “item 9,” which apparently was a question posed in an email sent by a GM employee. In any case, Burns replied, “By respond, so you mean [sic] remind them that I recommended using two gas springs?”

Soon after JWF produced this email and at a hearing conducted on another subject, counsel for Simpson vigorously contended that the email should be considered inadmissible due to its delayed disclosure. The circuit court permitted the parties time to respond in writing. Before the

next hearing, counsel filed a notice indicating that plaintiff would seek a “default” based on JWF's belated production of the email. At the hearing, however, Simpson's counsel conceded that a default “would be too serious.” The court indicated that it would not enter a default. On appeal, plaintiff asserts that the circuit court erred by refusing to enter a default or other sanction against JWF arising from its “withholding” of evidence.

We agree with plaintiff that the email fell within the scope of plaintiff's earlier discovery requests, and should have been produced. Nevertheless, we discern no basis to sanction JWF for this omission with the entry of a default.

A multitude of engineering experts were consulted by the parties. And the parties' interests were markedly adverse to each other. For example, GM's expert supplied testimony inculcating Stabilus; other defense experts pointed the proverbial finger at GM. None of the engineers opined that the *rack* was defectively designed, or that two springs should have been used. In other words, none of the testimony inculpated JWF. This omission is particularly notable because an initial concept drawing produced by GM *did* depict a rack with two springs on each sidewall. The two-spring theory was neither concealed nor impossible to develop even absent the Burns email. And at this point, the question borders on being

moot, as we have held that JWF must be dismissed as a party to this lawsuit.

Given the expert testimony, we question whether the Burns email is relevant on remand. We leave this determination to the circuit court.

VI. SUMMARY


We affirm the circuit court's orders denying summary disposition to Stabilus and denying plaintiff's motion for sanctions against JWF. We reverse the circuit court's order granting summary disposition to Keener. Plaintiff may proceed against Keener on an express warranty theory; the circuit court in its discretion may entertain a motion for summary disposition regarding this claim. We reverse the circuit court's order denying summary disposition to JWF. We award no costs to any party, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2020 WL 39978, Prod.Liab.Rep. (CCH) P 20,786

Footnotes

- 1 Plaintiff's claims against GM centered on the removal of the clip, which likely occurred before the rack reached Dort, and on GM's allegedly negligent overextension of the rack's sidewalls. According to plaintiff, GM workers had dragged the racks with fork-lift trucks, bending the left sidewall and damaging internal components of the spring.
- 2 Stabilus cites at length the deposition testimony of another of plaintiff's experts, John Lauhoff, for the proposition that the spring harbored no defects. Lauhoff is not a mechanical engineer, and was not offered by plaintiff as an expert in product design or manufacturing. Rather, his area of expertise is workplace safety. He testified as plaintiff's primary expert witness against General Motors. In evaluating whether summary disposition should have been granted on Stabilus's behalf, we have considered the evidence in the light most favorable to plaintiff. Where Lauhoff disagreed with Akhavein (particularly regarding issues indisputably falling outside of Lauhoff's expertise) we have disregarded Lauhoff's testimony, as required under basic summary disposition principles.
- 3 Plaintiff has not pursued a claim for express warranty against JWF, and therefore [MCL 600.2947\(6\)\(b\)](#) is inapplicable.

- 4 The parties also refer to the rack as “the container.”
- 5 We take no position regarding whether Keener did, in fact, make this warranty. If raised by Keener, this is an issue to be decided by the circuit court.
- 6 Privity of contract is not a prerequisite to an express warranty claim.  [Bouverette](#), 245 Mich. App. at 398.
- 7 If the court determines that an express warranty exists, it must then consider whether Keener breached the express warranty, and whether the breach was a proximate cause of plaintiff's injuries and damages. We note that some evidence of record supports that overextension of the rack's sidewalls was foreseeable. For example, Mattice testified that the rack's design features “may lead to a possible overextension of the gas spring when the sidewall is lifted, put in a vertical position,” and that “pushing the sidewall outward could possibly overextend” the spring, “elongat[ing]” it. Whether this evidence and similar testimony suffices to establish that Simpson's injury was a foreseeable consequence of Keener's breach of an express warranty is a question for the circuit court. We note that without further elaboration by the circuit court, the length of time that the rack was used, standing alone, does not render Simpson's injury unforeseeable under a breach of warranty theory.

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Exhibit D

2023 WL 1961228

Only the Westlaw citation is currently available.

United States Court of Appeals, Sixth Circuit.

Angelo THOMPSON, Plaintiff-Appellant,

v.

RYOBI LIMITED, et al., Defendants,

Techtronic Industries North American (TTI); One World Technologies, Incorporated, Defendants-Appellees.

Case No. 22-1228

|

FILED February 13, 2023

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

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Jeffrey Charles Gerish, Plunkett Cooney, Bloomfield Hills, MI, Matthew J. Stanczyk, Plunkett Cooney, Detroit, MI, for Defendants-Appellees Techtronic Industries North America (TTI), One World Technologies, Incorporated, Home Depot U.S.A., Inc.

Before: COLE, NALBANDIAN, and READLER, Circuit Judges.

OPINION

COLE, Circuit Judge.

*1 Angelo Thompson suffered severe burns due to a generator fire on the roof of his residence. To recover damages from the incident, Thompson sued various parties, including the generator manufacturer and seller, under a theory of products liability. The defendants relevant on appeal, Techtronic Industries North American (“Techtronic”) and One World Technologies, Inc. (“One World”), moved for summary judgment, disclaiming liability due to Thompson’s alleged impairment and unforeseeable misuse. The district court granted summary judgment on both grounds. We affirm.

I. BACKGROUND**A. Facts**

Angelo Thompson resides in an apartment complex that often uses a generator as a source of power when the building owner is unable to pay for electricity. This case concerns one such generator—a Ryobi gasoline-powered generator designed by One World. Thompson’s landlord purchased the generator for use at Thompson’s building on or about September 16, 2016, and it was installed on the roof that same day. The power went out in Thompson’s building on September 25, 2016. Another tenant, Brook Banham, tried to restart the generator. Around 9:30 p.m., Banham told Thompson that he was unable to start the Ryobi generator, so Thompson went to help.

Thompson testified that he had read the operator’s manual for a prior generator and at least some of the Ryobi generator operator’s manual, and that he knew the risks of gasoline. Thompson was unable to start the generator and decided to check the generator’s gas level. The generator did not have an external gas gauge, so he removed the gas cap, tilted the generator using the upright handle, and shined his flashlight inside. After seeing there was gas in the generator, there was an “explosion,” and Thompson’s pant legs caught on fire—the gas “was all over [him], and [he] was all on fire.” (Pl.’s Dep., R. 60, Ex. 2, PageID 961–62, 966–67.)

Banham and his wife came to the roof to help after hearing Thompson’s screams, where they then saw Thompson “on the ground, kind of rolling around, trying to pat the flames on his legs and shoes.” (Brook Banham Dep., R. 73, Ex. 4, PageID 2416.) Banham used a fire extinguisher to put out the remaining flames. Thompson refused Banham’s offer to call an ambulance, but Banham later drove him to the hospital.

The explosion resulted in second and third degree burns to Thompson’s lower legs, covering 18 or 19% of his body. Thompson underwent multiple skin-graft surgeries and has ongoing physical and emotional pain and difficulties resulting from the incident. At the hospital, tests from 1:56 a.m.—approximately four hours after the fire—revealed Thompson had a blood alcohol concentration (“BAC”) of 0.046 and his urine drug screen was positive for cannabinoids, cocaine metabolite, and opiates.

The defendants’ medical toxicologist expert, Dr. Kirk Charles Mills, interpreted Thompson’s blood and urine samples from the hospital. Specifically, Dr. Mills applied a scientific

technique called “retrograde extrapolation” to estimate Thompson's earlier BAC based on his later BAC, factoring in the average male population's alcohol metabolism rate. (Mills Rep., R. 60, Ex. 7, PageID 1020–21.) He calculated that “Thompson's extrapolated BAC at the time of the accident was most likely between 0.086 and 0.126, with an average BAC of 0.106 at [the time of the accident.]” Dr. Mills concluded that a BAC in his estimated range is “more than sufficient to cause alcohol impairment” and that “more likely than not, Mr. Thompson's alcohol impairment was a major contributor to the accident,” which occurred as a result of Thompson “remov[ing] the generator gas cap, tilt[ing] the generator forward, spilling gasoline on himself and the generator, [and] causing ignition of the gasoline[.]” He stated that Thompson's injuries from this ignition were “entirely preventable” had he not operated the generator while under the influence of alcohol. Dr. Mills noted that Thompson understood the operator's manual's warning to “not operate generator when you are ... under the influence of drugs, alcohol, or medication” to mean “that if you are [sic] impaired in any way [sic] you could make a deadly mistake.”

*2 Dr. Mills also discussed Thompson's drug screen, which was positive for cannabinoids, cocaine metabolite, and opiates. While Thompson did not appear to be impaired by drugs at the hospital, Dr. Mills noted that the time delay between the accident and his evaluation was long enough for him to not show signs of drug impairment even if he had consumed such substances. But positive urine tests for such substances may indicate use prior to the day of the incident, and the positive opioids result could have been from an IV at the hospital. So, Dr. Mills ultimately based his conclusion on Thompson's impairment due to alcohol, not drugs.

As to the generator itself, the defendants submitted an evaluation by a mechanical engineer and certified fire and explosion investigator, Dennis Scardino. Scardino concluded that Thompson introduced the ignition source, that Thompson's conduct caused the gas spill and the fire, and that, ultimately, the generator's design “was not defective and was not a cause of this fire.” (Scardino Rep., R. 60, Ex. 9, PageID 1076.) As to his conclusion about the generator not being defective, Scardino reported that the “fuel [level indicator] cap feature is not necessary for the safe operation of a generator” and that “deliberate removal of the generator's fuel fill cap with the subsequent deliberate movement (e.g., tilting ...) of the generator would not be a reasonable action[.]” Scardino also noted Thompson's knowledge of the hazards of gasoline and his review of the generator's operator's manual

and the “on-product decals and instructions” prior to the incident, which Scardino said were “adequate and sufficient for the safe operation of the generator.”

In addition, the defendants submitted an affidavit from David Anderson, a product safety engineer at Techtronic who is familiar with or has personal knowledge of the design, use, operation, and associated standards of the generator at issue. (Anderson Aff., R. 60, Ex. 4, PageID 972.) Anderson testified that Thompson's conduct constituted a misuse of the generator, and that such misuse is unforeseeable. As to the tipping, Thompson alleged the generator was defective by having an upright “hand truck” style handle and by not having an external gas gauge or forward stabilizing legs. (Compl., R. 1, PageID 22–25.) Anderson claimed the manufacturer has “no record of any claim or suit of injury that the Ryobi generator ... was somehow defective” in the ways Thompson alleged. He further stated that operating the generator the way Thompson did—knowing the hazards of gasoline, as described in the generator's manual—is “inconsistent with actions of a reasonably prudent consumer.” As to intoxication, he pointed to the manual's “explicit warning ... about not attempting to operate the generator when under the influence of alcohol” as evidence that doing so, especially knowing the risks, would be an unforeseeable misuse.

B. Procedural History

Thompson filed a product liability suit alleging (1) negligent design and (2) breach of implied warranties of fitness for a particular purpose and merchantability. The suit was originally filed in state court against Ryobi Limited, Ryobi Tools, Techtronic, One World, and Home Depot. Some of the original defendants removed the lawsuit to federal court based on diversity jurisdiction. Ryobi Limited, Ryobi Tools, and Home Depot were dismissed at various points during the litigation, so the relevant defendants here are Techtronic and One World (“defendants”)—Techtronic only as the parent company of One World, who designed the generator at issue.


Discovery commenced, and the defendants sought to preclude Thompson from calling four proposed experts as witnesses, as well as from calling any treating physician for their testimony. A magistrate judge granted the motion to exclude as to two experts and denied as to two experts, and limited what Thompson's treating physicians could testify about. The defendants timely objected. The defendants simultaneously sought summary judgment on five grounds, including two relevant on appeal: impairment and unforeseeable misuse.

*3 The district court granted summary judgment on both grounds, finding that Thompson failed to present arguments or evidence sufficient to create a genuine issue of material fact. district court also denied the defendants' motion to strike Thompson's multiple briefs in response to the defendants' motion for summary judgment—two of which were untimely—and denied the defendants' objections to the magistrate judge's order as moot.



On appeal, Thompson challenges both grounds of the district court's grant of summary judgment in favor of the defendants.


II. ANALYSIS

A. Legal Standard

We review the district court's grant of summary judgment de novo, viewing all the evidence and inferences in the light most favorable to the nonmoving party.  *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001).

Rule 56 requires summary judgment against a party who fails to establish the existence of an element essential to their case on which they would bear the burden of proof at trial.

 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Summary judgment employs a burden shifting framework: if the moving party meets their burden of “demonstrating the absence of a genuine issue of material fact,” “the nonmoving party must come forward with ‘specific facts showing that there is a *genuine issue for trial*.’”  *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10, 587 (1986) (quoting *Fed. R. Civ. P. 56(e)* (amended 2010)). To satisfy this burden, the nonmoving party must present a sufficient amount of evidence such that a reasonable juror could find for them,

 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and must direct the court to specific facts in the materials in the record to support their argument, *Fed. R. Civ. P. 56(c)(1)*;

 *Celotex*, 477 U.S. at 324.

B. Analysis

1. Misuse

“A manufacturer or seller is not liable in a product liability action for harm *caused by misuse* of a product unless the misuse was *reasonably foreseeable*.” *Mich. Comp. Laws* § 600.2947(2) (emphasis added). So, to avoid liability on

misuse grounds, we must resolve two legal questions in favor of the defendants: (1) that there was a misuse of the product, and (2) that such use was not reasonably foreseeable. *See id.*

“Misuse” has been statutorily defined by the Michigan legislature as “use of a product in a materially different manner than the product's intended use,” including “uses contrary to a warning or instruction ... and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.” *Mich. Comp. Laws* § 600.2945(e). Though “reasonably foreseeable” has not been as clearly defined, according to the Michigan Supreme Court, “the crucial inquiry is whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of that misuse,” which includes “whether that misuse was a common practice, or if foreseeability was inherent in the product.” *Iliades v. Dieffenbacher N. Am. Inc.*, 915 N.W.2d 338, 344 (Mich. 2018).

As a threshold matter, we define the “misuse” at issue. The district court agreed with the defendants that Thompson misused the generator by tipping the generator while the cap was off and by operating it while impaired. On appeal, Thompson “does not challenge a finding of ‘misuse’ under [the statute's] broad definition,” (Appellant Br. 18 n.6), so we accept the district court's characterization and proceed assuming Thompson misused the generator in both of these ways.

*4 Regardless of whether the defendants assert unforeseeable misuse as a statutory defense or whether Thompson must prove his misuse was reasonable as part of his prima facie case, the impact is the same: the underlying product liability action can only move forward to the extent that the defendants can be held liable, which turns here on whether Thompson unforeseeably misused the generator.

Thompson is correct that “if ‘misuse’ is ‘foreseeable’ the case may move forward.” (Appellant Br. 18 n.6.) But at the summary judgment stage, if the moving party presents evidence in their favor—here, that the misuses were unforeseeable—the nonmoving party must then present evidence to rebut the moving party's assertions—here, that the misuses were foreseeable. As discussed above, the defendants submitted a report from a fire and explosion investigator and an affidavit from a Techtronic product safety engineer. Both the report and affidavit support a finding that Thompson's misuses of the generator were not reasonably foreseeable.

Both Scardino and Anderson concluded that Thompson misused the generator and discussed Thompson's knowledge of the relevant safety guidelines, such as the hazards of gasoline and warnings not to operate the generator under the influence. Scardino focused on the safety of the generator as designed, and opined that the misuse by tilting was not "inherent" in the product because it was "not ... a reasonable action as it would be expected to result in gasoline spillage[.]" Anderson attested that Thompson's tilting and use of the generator while under the influence are unintended uses, and that the defendants were unaware of any uses of the generator in this way. In their motion for summary judgment, the defendants engaged with the report and affidavit, and directed the court to this evidence in the record to support that both misuses were unforeseeable.

In response below, Thompson put forth no argument to counter the defendants' arguments that neither misuse is foreseeable. Thompson's response focused only on establishing the elements of his underlying products liability claim for negligent design, and specifically on proving an alternative design. But as discussed, in order to succeed on his products liability claim, Thompson must be able to hold the defendants liable. Even if Thompson properly alleged the other elements of his products liability claim, if the defendants can prove they are not liable due to Thompson's actions, the case does not move forward. At the summary judgment stage, Thompson must proffer enough evidence that a jury could reasonably find that either misuse was foreseeable. Thompson failed to do so in his response, and we limit our review to that document on appeal. *See Rutland v. R & R Trailers Inc.*, No. 21-1181, 2021 WL 4847704, at *2 (6th Cir. 2021) (addressing a forfeited misuse argument).

Ultimately, because Thompson, as the nonmoving party, did not "come forward with some probative evidence" that his misuse was foreseeable such that it would be "necessary to resolve the differences at trial," summary judgment is appropriate. *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991).

2. Impairment

To win on Michigan's impairment affirmative defense at the summary judgment stage, the defendants must show that Thompson was "impaired," as defined in the statute, and that because of this impairment, Thompson was 50% or more the cause of the accident or event that resulted in his injury.

Mich. Comp. Laws § 600.2955a(1); *Harbour v. Corr. Med.*

Servs., Inc., 702 N.W.2d 671, 674 (Mich. Ct. App. 2005). If an individual is considered "impaired" as it relates to vehicle operation, that individual is presumed to be "impaired" in the personal injury context. *Mich. Comp. Laws § 600.2955a(2)(b)*. Per Michigan law, an individual is too impaired to operate a vehicle if their blood alcohol concentration (BAC) is 0.08 or above.¹ *Mich. Comp. Laws § 257.625(1)(b)*. So, an individual with a BAC of 0.08 or above is presumed to be impaired in the personal injury context. If the defendant demonstrates that such a presumption applies, and that the individual's impairment was 50% or more the cause of the accident, the burden then shifts to the plaintiff to prove a genuine dispute of fact on either element. *See Campbell*, 238 F.3d at 775.

*5 As to impairment, the defendants proffered its expert toxicologist's opinion that, based on Thompson's hospital toxicology records approximately four hours after the incident, Thompson's BAC would have been between 0.086 and 0.126, with an average of 0.106, at the time of the incident. Mills' report puts Thompson's BAC over the legal driving limit, which entitles the defendants to a presumption that Thompson was impaired at the time of the incident. *See Mich. Comp. Laws § 600.2955a(2)(b)*. In response, Thompson asserted that his decisions to roll himself or jump to the ground from the roof and call out for help upon landing were conscious, life-saving choices. This "alertness and presence of mind," he claimed, "exemplifies contrary indications that any consumption of alcohol adversely affected [his] alertness and analytical ability[.]" (Pl.'s Resp. to Defs.' Mot. Summ. J., R. 72, PageID 2317.) But he does not present any evidence—only argument—that this was his state of mind at the time of the incident. *See Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006) ("Arguments in parties' briefs are not evidence."). So, the defendants carried their burden on the first prong of the impairment defense.

As to causation, finding that this BAC is "more than sufficient to cause alcohol impairment," Mills opined that such impairment was "more likely than not ... a major contributor to the accident" when considering Thompson's knowledge of both the risk of operating the generator while impaired and the flammable nature of the gas. Mills concluded the injury was "entirely preventable" had Thompson not used the generator while impaired, and that doing so is "consistent with risk-taking behavior due to poor judgment caused by alcohol impairment." On this evidence alone, the district court determined there was no dispute of fact on causation

—a conclusion required to grant summary judgment on this ground.

While we agree with the district court that Thompson ultimately failed to present evidence to rebut the presumption that he was impaired, we withhold judgment on the second element of the impairment defense. As we grant summary judgment to the defendants regardless, we need not definitively determine whether the defendants' evidence constitutes un rebutted evidence that, because of his impairment, Thompson was 50% or more the cause of the accident.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's opinion and order.

All Citations

Not Reported in Fed. Rptr., 2023 WL 1961228

Footnotes


- 1 Michigan increased the impairment presumption BAC to 0.10 in 2021 but, as the conduct occurred in 2016, we agree with the district court that the 0.08 BAC level should control. See Op. and Order, R. 87, PageID 3032 n.4 (interpreting  Mich. Comp. Laws § 257.625(1)(b)).

Exhibit E

2021 WL 4847704

United States Court of Appeals, Sixth Circuit.

Arthur W. RUTLAND, Plaintiff-Appellant,

v.

R & R TRAILERS, INC., a Michigan
Corporation, Defendant-Appellee.

No. 21-1181

|

FILED October 18, 2021

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MICHIGAN**Attorneys and Law Firms**Lyle Andrew Peck, Peck & Associates, Petoskey, MI, for
Plaintiff-Appellant.Douglas M. Chapman, Clark Hill, Birmingham, MI, for
Defendant-Appellee.Before: BATCHELDER, LARSEN, and READLER, Circuit
Judges.**Opinion**

LARSEN, Circuit Judge.

*1 Arthur Rutland was injured while using a trailer. He brought a product liability action under Michigan law against the manufacturer, R & R Trailers, Inc. The district court granted summary judgment in favor of R & R. We AFFIRM.


I.

Rutland purchased a trailer manufactured and sold by R & R. The trailer had a rear door that becomes a ramp when lowered to the ground. As the district court explained, “Lowering and raising the trailer door is assisted by a torsion rod double spring system welded to the interior frame of the trailer.” The trailer contained a warning label that explained the extreme danger that could result from tampering with the spring system, that repairs or adjustments should be done only by experienced service personnel, and that a person should “[k]eep all body parts away from cables.”

Rutland used the trailer for nearly ten years without issue. Then, on September 15, 2018, he took the trailer to a lumber yard. While inside the trailer, he noticed an electrical wire resting on the torsion spring on the right side of the trailer. He checked the corresponding wire on the left side of the trailer and saw that it was loose. But the wire on the right was tight—there was tension on it. Rutland grabbed the wire and tried to move it. He heard a “bang” and the next thing he knew he was on the floor and injured. The bracket holding the spring system had detached from the wall, causing the spring system to release. Rutland's hands were severely damaged, and his right shoulder and left knee were injured.

Invoking the court's diversity jurisdiction, Rutland sued R & R in federal court, bringing one claim of negligent product defect liability under Michigan law. Both parties moved for summary judgment. The district court granted summary judgment in R & R's favor, concluding that Rutland had misused the trailer when he moved the wire and touched the bracket and that such misuse was not reasonably foreseeable. As a result, Michigan law precluded liability. Rutland appeals.



II.

We review the district court's summary judgment decision de novo. *Franklin Am. Mortg. Co. v. Univ. Nat'l Bank of Lawrence*, 910 F.3d 270, 275 (6th Cir. 2018). “[S]ummary judgment is warranted only if ‘there is no genuine issue as to any material fact’ and ‘the movant is entitled to judgment as a matter of law.’ ” *Id.* (quoting *Fed. R. Civ. P. 56(a)* and  *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013)).

Product liability actions in Michigan are governed by statute. See *Mich. Comp. Laws (MCL) §§ 600.2945–2949*. “As part of major tort reform efforts in 1995,” *Iliades v. Dieffenbacher N. Am. Inc.*, 915 N.W.2d 338, 343 (Mich. 2018), the Michigan Legislature provided that “[a] manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable,” *MCL § 600.2947(2)*. “ ‘Misuse’ means use of a product in a materially different manner than the product's intended use.” *Id. § 600.2945(e)*. It “includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be

considered suitable by a reasonably prudent person in the same or similar circumstances.” *Id.* “Whether the misuse was reasonably foreseeable depends on whether [the manufacturer or seller] knew or should have known of the misuse.” *Iliades*, 915 N.W.2d at 345. “Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.” MCL § 600.2947(2).

*2 On appeal, Rutland argues that the district court erred by concluding that he misused the trailer; he also argues that any misuse did not preclude liability. R & R, however, says that Rutland has forfeited any chance to make those arguments here because he did not raise them before the district court. We agree with R & R.

“It is well-settled that this court’s ‘function is to review the case presented to the district court, rather than a better case fashioned after an unfavorable order.’ ”  *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006) (alterations adopted) (quoting  *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005)). “[T]he failure to present an issue to the district court forfeits the right to have the argument addressed on appeal.” *Id.*

In its motion for summary judgment, R & R advanced two alternative arguments: (1) that Rutland’s own conduct was an intervening superseding cause of his injuries; and (2) that Rutland’s unforeseeable misuse of the trailer caused his injuries, meaning that Rutland’s claim failed under the Michigan product liability statute. Rutland responded to the first argument but not the second. In fact, he never mentioned the word “misuse” at all. In its reply, R & R noted Rutland’s complete failure to address the “misuse” argument. Unsurprisingly, the district court sided with R & R. Given Rutland’s complete failure to address R & R’s misuse theory below, Rutland has forfeited the ability to challenge it now.

See  *Armstrong*, 432 F.3d at 700.

Rutland argues that he did address the “misuse” argument in the trial court, though he did not cite the Michigan statute or use the word “misuse.” We disagree. Nowhere in the response did Rutland quarrel with R & R’s contention that his conduct constituted “misuse” as defined in MCL § 600.2945(e). The response did not address whether his actions were contrary to the warning label. Nor did it contest R & R’s assertion that it was not reasonably foreseeable that Rutland would ignore the warning label and tinker with the spring system. Having failed to contest these assertions below, he cannot do so now.


Rutland says that “[f]ar from waiving the misuse issue, [he] presented expert and lay testimony that negated elements of the misuse defense.” Maybe so. But the district court was not required to “excavate” the record to find any such evidence. *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 405 (6th Cir. 1992). Rutland had a duty to present it to the court in response to R & R’s arguments. See *id.* at 406 (“Rule [56] requires the non-moving party to do its own work, and to assist the trial court by responding to the motion, pointing out as specifically as is reasonably possible facts that might demonstrate the existence of genuine issues.”); see also *Wardle v. Lexington-Fayette Urb. Cnty. Gov’t*, 45 F. App’x 505, 509 (6th Cir. 2002) (per curiam) (“[A] district court is not required to search the record to determine whether genuine issues of material fact exist when the non-moving party has failed to point them out.”).

Rutland says that since his response focused on whether he proximately caused the bracket to dislodge from the trailer, he was directly attacking an element of a “misuse” defense—causation. Here, Rutland is partially right. The alleged misuse certainly must have “caused” the harm in order to bar liability. See MCL § 600.2947(2). And the principal focus of Rutland’s response was that his conduct was not substantial enough to detach the weld from the wall; instead, the negligently welded bracket happened to break while Rutland was standing in the trailer.

*3 But even if we assume that the bracket had been welded negligently (as the district court did when discussing the misuse argument), the evidence shows that Rutland’s moving of the wire caused the bracket to dislodge from the wall. Temporal proximity aside, Rutland acknowledged that he would have had to grab and move the electrical wire, which was resting on the bracket, in order “for [the bracket] to come out.” And he said that once he moved the wire, the bracket did, in fact, come out.


Rutland’s experts do not contradict this point. Instead, his experts aver that the bracket had been negligently welded to the trailer and that the spring system failed because of the defective weld. Although Rutland’s experts explained that “there was no evidence of excessive forces applied on the bracket that would have caused the weld failure” and that “anyone touching or examining the electrical wires running above the bracket” would not cause the weld to break, that was in the context of a properly welded bracket. His experts did not opine on whether Rutland’s grabbing and moving of

the wire would have caused a negligently welded bracket to break. As a result, even assuming that the welding had been negligently done, the evidence establishes that Rutland's actions caused the weld to break.

Finally, we note that Rutland responded to the “misuse” argument in his motion for reconsideration. But that cannot excuse the failure to address the arguments in his response to R & R's summary judgment motion. Like arguments raised for the first time on appeal, arguments raised for the first time in a motion for reconsideration are also “untimely and forfeited on appeal.”  *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 692 (6th Cir. 2012). What's more, the order denying Rutland's motion for reconsideration is not properly before us. Rutland filed his notice of appeal before the district court had ruled on his reconsideration motion.¹ And he did not amend it, or file a second notice of appeal, to account for the order denying reconsideration. See *Shepard v. Uniboring*, 72 F. App'x 333, 335 (6th Cir. 2003); Fed. R. App. P. 3(c)(1)(B); Fed. R. App. P. 4(a)(4)(B)(ii).

But even if we were to consider the arguments raised in that motion, we would reach the same result. Rutland's motion for reconsideration never acknowledged that the district court had assumed without deciding that the bracket had been negligently welded. Moreover, Rutland's main contention appears to have been that the district court erred by not sending the question of “misuse” to the jury. That argument is foreclosed by statute. The Michigan Legislature has made clear that “[w]hether there was misuse of a product and

whether misuse was reasonably foreseeable are legal issues to be resolved by the court.” MCL § 600.2947(2).

In sum, Rutland has forfeited any challenges to the district court's conclusion that he had misused the trailer in a manner that was not reasonably foreseeable.² And even assuming that the welding was negligent as Rutland argues, Rutland's misuse caused the weld to break. This unforeseeable misuse bars Rutland's product liability action against R & R, regardless of R & R's own negligence. See *Fjolla v. Nacco Materials Handling Grp.*, No. 281493, 2008 WL 5158892, *4 (Mich. Ct. App. Dec. 9, 2008) (“Unforeseeable misuse of a product bars a product liability action.”); see also  *Belleville v. Rockford Mfg. Grp.*, 172 F. Supp. 2d 913, 918 (E.D. Mich. 2001) (recognizing that “misuse of a product is an absolute defense for a manufacturer or seller of a product in a product liability action”); *Johnson v. Serv. Tool Co.*, No. 2:14-cv-12438, 2015 WL 7760480, *6 (E.D. Mich. Nov. 30, 2015) (same). Summary judgment in favor of R & R was appropriate.

*4

* * *

We AFFIRM.

All Citations

Not Reported in Fed. Rptr., 2021 WL 4847704, Prod.Liab.Rep. (CCH) P 21,264

Footnotes


- 1 We held the appeal in abeyance pending the district court's ruling on that motion.
- 2 Rutland asks us to exercise our discretion and excuse any forfeiture. Such discretion, however, is reserved for exceptional circumstances. See  *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552–53 (6th Cir. 2008). We rarely exercise such discretion, see *id.*, and decline to do so here.

Exhibit F

2018 WL 5275518

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.

Steven ILIADES and Jane Iliades, Plaintiffs-Appellants,

v.

DIEFFENBACHER NORTH
AMERICA INC., Defendant-Appellee.

No. 324726

|

October 16, 2018

ON REMAND, Oakland Circuit Court, LC No. 12-129407-
NP

Before: Ronayne Krause, P.J., and Jansen and Stephens, JJ.


Opinion


Per Curiam.

*1 This matter returns to us on remand¹ from our Supreme Court with directions to expressly determine whether and how plaintiff Steven Iliades “misused” a 500-ton industrial press machine manufactured by defendant Dieffenbacher North America and whether any such misuse was “reasonably foreseeable,” as those terms are meant in [MCL 600.2947\(2\)](#). Our Supreme Court has provided us with a definition of the latter term not defined by statute. Previously,² we presumed plaintiff’s conduct constituted misuse of the press and proceeded to evaluate the foreseeability of that misuse. We also concluded that because foreseeability was not defined by statute, and no other definition existed that provided a sufficiently objective test for foreseeability, the next best alternative was to analogize to the distinction between ordinary and gross negligence in criminal contexts. Our Supreme Court has now set us in a different direction and has remanded the matter to us. We reach the same conclusion we reached previously, and thus we again reverse the trial court and remand for further proceedings.

The word “misuse” for purposes of the product liability statute:

means use of a product in a materially different manner than the product’s intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances. [[MCL 600.2945\(e\)](#).]

Plaintiffs never explicitly admitted that leaning into the press machine constitutes “misuse” of the press machine. Furthermore, plaintiffs make the reasonable argument that, at face value, the statute appears to absurdly construe *any* departure from explicit and formal operating instructions as “misuse.” However, we are constrained by plain and unambiguous language in a statute, absurd or not. See  [People v. McIntire](#), 461 Mich. 147, 155-159; 599 N.W.2d 102 (1999). There is no serious dispute that plaintiff failed to fully comply with operating instructions. Consequently, while the egregiousness of that departure might be fairly debatable, we are constrained to find that plaintiff “misused” the press machine within the meaning of [MCL 600.2947\(2\)](#).

Our Supreme Court states that, within the meaning of the statute, “reasonably foreseeable” means “a reasonable man could anticipate that a given event might occur under certain conditions.”  [Samson v. Saginaw Professional Bldg., Inc.](#), 393 Mich. 393, 406; 224 N.W.2d 843 (1975). It also requires the specific misuse at issue to have been reasonably foreseeable at the time the product was manufactured, for reasons that might include the particular misuse being a common practice, “or if foreseeability was inherent in the product.” *Iliades II*, 501 Mich. at 338-339. Common sense tells us that scrupulously and exhaustively following all safety and operating instructions is not common, and indeed may even be the exception rather than the norm. It is not merely reasonably foreseeable, but in fact *inevitable* that

some departure from compliance with formal guidelines or “misuse” will occur.

*2 One fact noted in our prior opinion but absent from our Supreme Court's factual recitation is that the “light curtain” safety devices³ installed on plaintiff's employer's presses were not original equipment; as we noted, “Defendant replaced the physical doors with light curtains because customers, including [plaintiff's employer], were ‘so desperate to kept [sic] the presses in production’ that they would bypass the doors, which defendant found ‘scary.’ ” *Iliades I*, slip op. at p 1. This does not, of course, prove that defendant was aware when the press was manufactured that someone would eventually lean partway inside of it. However, testimony adduced in this case noted that plaintiff's employer was not alone in incentivizing productivity.

Thus, it is clear that not only is some kind of “misuse” reasonably foreseeable, but so is a more specific “misuse” in the form of actions and processes that reduce instances of shutting down the presses. Other testimony in this case highlighted the fact that although press operators were not supposed to enter a press running in automatic mode unless it had been stopped, they were also not supposed to switch the presses off except in “true emergencies.” It was further generally agreed upon by the trainers that no matter what the employees were instructed to do, using the light curtain to halt the presses during part removal was sometimes the only practical option. It was known that notwithstanding the emphatic safety training, operators would commonly reach into the press before it was at a complete stop because doing so could save them 10 to 20 seconds per part retrieval operation. Whether or not press operators were supposed to rely on the light curtain to halt a press while retrieving a part, the light curtains were used for that purpose.

Consequently, our final inquiry is whether a press manufacturer should reasonably expect that a press operator will eventually lean into the interior of the press, relying upon a safety system that, perhaps ironically, otherwise worked fairly predictably. We have no reason to dispute defendant's assertion that it is unaware of any other press operators being injured in the same manner as plaintiff was injured here; however, at the most that shows that the safety features usually work, not that no one had previously entered a press. As we noted previously, there is some irony in a safety product working too well.⁴ It is human nature to rely on such personal experience notwithstanding official warnings. Nevertheless, we conclude that whether the specific misuse at issue here was

reasonably foreseeable depends on a genuine factual question that we cannot resolve by reviewing the record: whether it was known or reasonably anticipated by defendant that parts would fall inside the press that could not be efficiently retrieved without partially entering the press.

*3 An electrical engineer employed by defendant testified, as a fact witness, that the press had doors on the sides and back that would stop the press if opened, but because they were access doors rather than guards, they were not “designed to go every cycle.” Furthermore, opening them would turn off both the press's motor and the press's pump, and turning the pump off every five minutes would be “stupid.” The press design therefore clearly anticipated regular retrieval of parts only through the front opening, where the light curtain was installed. The issuance of “parts grabbers,” poles with a hand actuator at one end and a gripper mechanism at the other, indicates that parts falling inside the press was not uncommon, and we have difficulty imagining defendant to be unaware of that phenomenon. What we do not know is defendant's awareness of the probability that parts would fall inside the press in such a way that they could not easily be retrieved without either shutting down the press at significant productivity cost or putting a significant portion of an operator's body inside the press. We recognize that “[w]hether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.” [MCL 600.2947\(2\)](#). However, within the standard of foreseeability articulated by our Supreme Court, we do not believe that as a panel of judges with little direct experience in mechanical design or industrial shop work, and certainly unfamiliar with the specific press at issue, that we can answer that question on this record.

In summary, we are constrained to find that plaintiff misused the press. We additionally find that misuse of the press is reasonably foreseeable, and misuse of the press specifically by bypassing safety features and unambiguous instructions at a clear risk of bodily injury in order to facilitate productivity is also reasonably foreseeable. We find a genuine question of fact whether, at the time the press was manufactured, it would have been reasonably foreseeable to defendant that entering the press to the extent plaintiff entered it, for the purpose of facilitating productivity, was reasonably foreseeable. We reiterate our prior finding that we also find it reasonably foreseeable that operators would come to rely on a safety feature that otherwise appears reliable to them, whether or not they were instructed to the contrary. We therefore again

reverse the trial court and remand for further proceedings. We do not retain jurisdiction.

of Appeals, issued July 19, 2016 (Docket No. 324726) (JANSEN, J. dissenting).

I would affirm the trial court's order granting summary disposition in favor of defendant.

JANSEN, J. (dissenting).

I respectfully dissent for the same reasons expressed in my earlier dissenting opinion. *Iliades v. Dieffenbacher North America, Inc.*, unpublished per curiam opinion of the Court

All Citations

Not Reported in N.W. Rptr., 2018 WL 5275518

Footnotes

- 1 *Iliades v. Dieffenbacher North America Inc.*, 501 Mich. 326, 341; 915 N.W.2d 338 (2018) (*Iliades II*).
- 2 *Iliades v. Dieffenbacher North America Inc.*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2016 (Docket No. 324726) (*Iliades I*).
- 3 Light curtains are safety devices that, instead of forming a physical barrier between an operator and equipment, shine multiple beams of light in parallel across an opening, much like an invisible waterfall, at a strip of light sensors. If any of the sensors detect that a light beam has been broken, presumably by a solid object passing through the opening, the light curtain will halt the equipment to which it is attached.
- 4 There was some testimony to the effect that Press Number 25 had a unique issue wherein the light curtain could be bypassed by getting behind it; in other words, the light curtain would “clear” if someone sufficiently thin got too close to the press. Consequently, the light curtain would not correctly detect something traversing the opening of the press. This improper operation was known, albeit surprising, to regular operators of that particular press – and plaintiff was *not* a regular operator of that press. The gravamen of plaintiff's claim is that the press should not have been able to automatically resume operation upon the light curtain clearing without manual input from an operator. Furthermore, this clearly shows that plaintiff could have had most of his body outside the press and traversing the opening at the time of the accident, which should have precluded the press from operating.

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