THE ELUSIVE EXPLODING CIGAR: EIGHTH CIRCUIT REAFFIRMS MINNESOTA'S GENERAL ALTERNATIVE-DESIGN REQUIREMENT FOR DESIGN-DEFECT CLAIMS

By Jeff Markowitz and Beth Prouty

Generally, for a plaintiff bringing a design-defect claim to prevail, she must show that the product manufacturer should have used an alternative, feasible, safer design. Proving the existence of such an alternative design is an *objective* way to prove that the design that the manufacturer chose is unreasonably dangerous. Minnesota, like some other states, leaves open the possibility that a rare product might be judged unreasonably dangerous not because the manufacturer failed to adopt an alternative design but because it placed the product on the market at all. But Minnesota caselaw—and caselaw of the other states—has not identified a real-world example. The Reporters of the Restatement (Third) of Torts: Products Liability imagined a vivid hypothetical to illustrate what sort of product would be the rare product: a novelty cigar, designed to explode when lit. But no state's law has ever seen such a product.

That issue came to the forefront in the recent federal decisions in *McDougall: McDougall v. CRC Indus., Inc.*, No. CV 20-1499 (JRT/LIB), 2024 WL 4894656 (D. Minn. Nov. 26, 2024), *vacated and remanded*, *McDougall v. CRC Indus., Inc.*, 166 F.4th 734 (8th Cir. Feb. 10, 2026), rehearing denied, No. 24-3614, 2026 WL 936775 (8th Cir. Apr. 7, 2026). This article's authors served as lead appellate counsel for the manufacturer, which obtained a reversal of the $7.75 million jury verdict. The product was an aerosol duster, intended to remove dust from electronics and various surfaces. The plaintiff's wife died in a tragic motor-vehicle crash after the other driver deliberately misused the product by huffing it while driving, thereby intoxicating himself. The plaintiff conceded that he offered no evidence of an alternative, feasible, safer design. The jury found that the manufacturer adequately warned against foreseeable misuse. The jury also found that the product was unreasonably dangerous by design, and the district court denied the manufacturer's motion for judgment as a matter of law. But the Eighth Circuit reversed due to the plaintiff's failure to offer any "evidentiary basis for the jury to balance the dangerousness of the duster against either the burden of an alternative design or its removal from the market." *McDougall*, 166 F.4th at 736-37.

This article reviews Minnesota's design-defect law, explains where *McDougall* fits, and discusses the Products Liability Restatement's guidance on how a court might decide whether a product satisfies the never-before-satisfied rare-case exception to the general alternative-design rule.

I. To prove a design-defect claim, the plaintiff must prove that the defect made the product "unreasonably dangerous."

A. An "objective" reasonable-care standard governs whether a design defect makes the product unreasonably dangerous.

To prove a design-defect claim, a plaintiff must prove that the alleged defect made the product *"unreasonably dangerous." Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987). A "reasonable care balancing test" governs whether the alleged defect made the product unreasonably dangerous. *Id*. at 95-96. That balancing test is "an objective standard, . . . which focuses on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors." *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984) (referencing *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 212 (Minn. 1982)).

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B. Satisfying that objective standard "normally" requires evidence that an alternative, feasible, safer design existed.

As *Kallio* explains, a plaintiff "normally" must prove that an alternative, feasible design would have made the product safer to prove that the manufacturer's chosen design made the product unreasonably dangerous. 407 N.W.2d at 96. *Kallio* makes clear that whether such an alternative design exists is "relevant to," "[o]bviously[] a factor bearing upon," and "certainly may be an important factor" when deciding whether an alleged design defect made the product unreasonably dangerous. *Id*. at 96-97.

That makes sense. At least ordinarily, "'one simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative . . . that can serve as the basis for a risk-benefit analysis.'" 1 Owen & Davis on Prod. Liab. § 8:10 (4th ed.) (quoting Schwartz, *Foreword: Understanding Products Liability*, 67 Cal. L. Rev. 435, 468 (1979)). The alternative design serves as an *objective* comparator by which to measure whether the chosen design made the product *unreasonably* dangerous. It is analogous to "the flawless product" in the manufacturing-defect context. *Cf. Bilotta*, 346 N.W.2d at 621-22. The flawless product is "an objective standard" to which a court can point and say *that* is how the product *should* have been manufactured, and the failure to make the product that way *objectively* made it *unreasonably* dangerous. See id. In the design-defect context, the alternative design is an *objective* alternative to which a court can point and say *that* is how the product *should* have been designed, and the failure to design it that way *objectively* made it *unreasonably* dangerous.

C. *Kallio* allows for "rare cases" that may be proved without alternative-design evidence. Minnesota has never seen one.

In *Kallio*, right after stating that alternative-design evidence "is not necessarily required in all cases," the Minnesota Supreme Court dropped Footnote 8, which explained: "Conceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned." 407 N.W.2d at 97 & n.8.

As the Eighth Circuit explained in *Wagner*, "While the Minnesota Supreme Court [in *Kallio*] did not go so far as to require proof of an alternative feasible design in all defective-products cases, the Court noted that it could only conceive of 'rare cases' in which 'the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned.'" *Wagner v. Hesston Corp*., 450 F.3d 756, 760 (8th Cir. 2006) (quoting Kallio, 407 N.W.2d at 97 & n.8). Judge Schiltz elaborated in *Kapps*:

Properly understood, . . . *Kallio* does not dispense with the requirement of an alternative design in design-defect cases. . . . [A] plaintiff cannot prevail in a design-defect case simply by arguing, in the abstract, that a product is defectively designed. Instead, the plaintiff must explain why, under the reasonable-care balancing test, the world would be a better place if the product were either designed differently or taken off the market.

Kapps v. Biosense Webster, Inc., 813 F. Supp. 2d 1128, 1161 (D. Minn. 2011) (Schiltz, J.), *followed in Am. Fam. Ins. Co., S.I. v. Pecron, LLC,* No. 21-CV-1749 (KMM/DJF), 2023 WL 8654202, at *4 & n.3 (D. Minn. Dec. 14, 2023) (Menendez, J.). Judge Schiltz granted summary judgment because the plaintiff offered "no evidence to show that, taking into account the costs and benefits of the Lasso catheter as currently designed, the catheter should have been designed differently or taken off of the market." *Id*. at 1161.

Based on our research, no court applying Minnesota law has ever found a product unreasonably dangerous due to a design defect without evidence of an alternative, feasible, safer design. In *Kallio*, the Minnesota Supreme Court said that successful design-defect plaintiffs had "*almost* without fail" introduced evidence of such an alternative design. 407 N.W.2d at 96 n.6 (emphasis added). The court's use of "almost" appears merely to reflect judicial caution, not a recognition of any design-defect plaintiff prevailing without alternative-design evidence. The court cited no case in which a design-defect plaintiff prevailed without alternative-design evidence.

Although *Kallio* left open the possibility of the rare exception, the Minnesota Supreme Court did not explain what such a product would look like. The issue on appeal was not whether the plaintiffs could prove a design-defect claim without alternative-design evidence. The plaintiffs "did present some evidence, albeit weak, that a practical safer design was feasible." *Id*. at 97. The dispute concerned the jury instructions. Ford argued that the jury should have been told that the plaintiffs had to prove "'a feasible practicable alternative design'" and that, without such evidence, "'they will be unable to prove that Ford's choice of design was unreasonable.'" *Id*. at 94 n.4. The Minnesota Supreme Court disagreed with Ford. The court's concern with Ford's proposed instruction was that it "tend[ed] to elevate proof of the existence of a feasible alternative safer design from a factor properly for jury consideration to an element." *Id*. at 97. The "tenor, if not the literal wording," of the instructions given already allowed the jury to "consider availability of, and failure to use, an alternative, safer design as a factor." *Id*. at 96.

II. *McDougall v. CRC Industries, Inc.*

A. The jury erroneously found that a product was unreasonably dangerous by design without alternative-design evidence.

McDougall placed a crisp spotlight on the rare-case exception. The plaintiff chose not to argue that an alternative, feasible design would have made the aerosol duster safer—and the evidence that no such alternative design existed was uncontradicted. Plaintiff's counsel conceded to the district court that he had "not presented evidence of alternative feasible design." *McDougall v. CRC Indus., Inc.*, No. 20-cv-01499-JRT-LIB, Dkt. 298, Vol. VII, Tr. 1410-1411 (U.S. Dist. Ct. Apr. 23, 2024). In closing argument, plaintiff's counsel told the jury that his "Number 1" point was that the plaintiff did not need to prove that an alternative, feasible, safer design existed. *Id.*, Dkt. 299, Vol. VIII, Tr. 1764-65 (Apr. 24, 2024). The jury also heard uncontradicted testimony from the manufacturer's product-safety expert that "[t]here is no evidence that alternative safer designs exist or that they would prevent intentional abuse of the product or that they would prevent the accident." *Id.*, Dkt. 298, Vol. VII, Tr. 1423. And the jury received uncontradicted evidence from a U.S. Consumer Product Safety Commission ("CPSC") report that "inhalant abusers will continue their behavior, even if aerosol duster products become unavailable." See U.S. Consumer Product Safety Commission, Memorandum and Staff Briefing Packet, July 20, 2022, PDF page 5, https://share.google/LDCoN5P5SuuFYyE3k. It was undisputed that, at the time of trial, the CPSC was actively studying and considering potential regulation of aerosol dusters.

The plaintiff argued that the duster was, nonetheless, unreasonably dangerous by design and that the manufacturer should be liable for not pulling it from the market. See *McDougall*, No. 20-cv-01499-JRT-LIB, Dkt. 299, Vol. VIII, Tr. 1762-63. The jury found for the plaintiff on this claim. See *McDougall*, 166 F.4th at 735.

B. The district court relied on a third-way reading of Kallio, which did not require the plaintiff to prove an alternative design or that the product was too dangerous for the market.

The manufacturer moved for and renewed its motion for judgment as a matter of law, arguing that the plaintiff introduced no evidence from which a jury could find the product unreasonably dangerous. In denying that motion, the district court expressly rejected Judge Schiltz's reading of *Kallio* in *Kapps*—and implicitly departed from the Eighth Circuit's reading in *Wagner. McDougall*, 2024 WL 4894656, at *7. In the *McDougall* district court judge's view, Minnesota law allowed a plaintiff to prevail without proving either that the manufacturer should have used an alternative design or that the product should have been removed from the market. *Id*.

C. The Eighth Circuit's reversal restored the status quo.

On appeal, the Eighth Circuit reaffirmed the *Wagner-Kapps* reading of *Kallio*. In reversing the verdict, the court noted that the plaintiff conceded he "'did not rely on the existence of an alternative design.'" *McDougall*, 166 F.4th at 736. "Nor did he present evidence [that the] duster is 'so dangerous that it should be removed from the market entirely.'" *Id*. (quoting *Wagner*, 450 F.3d at 736). Consequently, the court concluded, "there was no evidentiary basis for the jury to balance the dangerousness of the duster against either the burden of an alternative design or its removal from the market." *Id*. at 736-37 (citing *Kapps*, 813 F. Supp. 2d at 1161; *Am. Fam.*, 2023 WL 8654202, at *4). The court's either-or rationale necessarily rejected the district court's reading of *Kallio* that neither alternative-design evidence nor too-dangerous-for-market evidence is required to prove a design-defect claim. Contrast id. at 736-37, with *McDougall*, 2024 WL 4894656, at *7.

The Eighth Circuit noted that, in closing argument, the plaintiff's counsel "told the jury that if [the manufacturer] can't make their duster safe, 'then get rid of it or you pay the price.'" *Id*. at 737 n.1. But it further noted that "the jury was instructed that statements by lawyers are not evidence, and [the Eighth Circuit] presume[s] it followed those instructions." *Id*.

Therefore, the Eighth Circuit reversed and remanded for entry of judgment as a matter of law for the manufacturer. *Id*. at 737.

That reversal was foreshadowed by questions during oral argument, including one from Judge Lavenski Smith: "[W]hat's the limiting factor for the use of precedent like this for other manufacturers and the obligation to foresee criminal misuse of what they put on the market?" *McDougall v. CRC Industries,* No. 24-3614, Oral Argument at 21:18-21:31, https://media-oa.ca8.uscourts.gov/OAaudio/2025/12/243614.MP3. There was none.

III. The Products Liability Restatement provides guidance for deciding whether Kallio's rare-case exception is met.

A. Manifestly Unreasonable Standard

If a judge or a jury ever must decide whether a product satisfies *Kallio's* rare-case exception, the Products Liability Restatement offers a useful standard for objectively resolving that issue. Like the general alternative-design rule in *Kallio*, Section 2(b) generally requires a "reasonable alternative design" to prove a design-defect claim. Restatement (Third) of Torts: Products Liability § 2(b) (1998). Like *Kallio* Footnote 8, comment e in Section 2's **Comment** "leaves open the possibility that courts may conclude that a product is manifestly unreasonable because the extremely high degree of danger posed by its use or consumption outweighs its negligible social utility." *Id*., § 2, **Reporters' Note**, cmt. b. Comment e states that, to satisfy this exception, the design must be "manifestly unreasonable," meaning that "the extremely high degree of danger posed by [the product's] use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product." *Id*., **Comment**, cmt. e.

B. Exploding-Cigar Illustration

The Reporters adopted the manifestly unreasonable exception with understandable caution. They found only three caselaw examples suggesting that there could ever be design-defect liability without alternative-design proof: (1) above-ground swimming pools with slippery vinyl bottoms, (2) asbestos, and (3) cheap handguns. *See O'Brien v. Muskin Corp.*, 463 A.2d 298, 306 (N.J. 1983) (pool example); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 112-113 (La. 1986) (asbestos example); *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1154 n.8, 1158 (Md. 1985) (handgun example). Each example was later overturned or sharply limited by legislation. Restatement (Third) of Torts, § 2, **Reporters' Note**, cmt. *d*, § IV.D. That thin support is why the exception never made it into Section 2's text. See James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. Mich. J.L. Reform 563, 586 (1997), ("We were reluctant to fashion a black letter rule on so slender a thread."). The Reporters understandably did not want to endorse broadly a theory that courts had largely rejected. At the same time, they did not want to foreclose the possibility that some nearly worthless and extremely dangerous product might justify liability without alternative-design evidence. So they crafted the manifestly unreasonable exception, but they placed the exception in "the more flexible medium of a comment," rather than in Section 2. *Id*. at 588.

The Reporters illustrated the exception with a vivid hypothetical: the exploding cigar. The imagined product is a gag gift—a novelty cigar designed to explode in the user's face when lit. Restatement (Third) of Torts § 2, **Comment**, cmt. *e*, illus. 5. Its social utility is negligible. Its danger, by contrast, is obvious and extreme because the product is meant to be placed in the mouth and ignited. That risk obviously substantially outweighs the utility. So a court could *objectively* find that the design is *manifestly* unreasonable and that the product is thus unreasonably dangerous.

The exploding-cigar illustration continues to be helpful guidance, given the absence of any real-world caselaw examples of alternative-design-less- unreasonably-dangerous-by-design products. *Parish v. Jumpking, Inc.*, is a case in which the Iowa Supreme Court considered whether a trampoline's design was manifestly unreasonable under the Restatement; the court concluded that it was not. 719 N.W.2d 540, 545 (Iowa 2006). The court pointed to the trampoline's real recreational and therapeutic benefits and to injury statistics that did not show the kind of overwhelming risk required. Id. Of note, the risk of a trampoline-related injury "rated below such common activities as basketball, bicycle riding, football, soccer, and skating." *Id*.

C. Consistent with Minnesota Law

Minnesota courts would likely look to the manifestly unreasonable standard for guidance in deciding whether a product fits within *Kallio's* rare-case exception. Minnesota courts have previously consulted the Restatement in products-liability cases, *see, e.g., Great N. Ins. Co. v. Honeywell Int'l, Inc.*, 911 N.W.2d 510, 520 (Minn. 2018); *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 631 n.4 (Minn. 2017), including Section 2(b), *SECURA Ins. Co. v. Deere & Co*., 12 N.W.3d 103, 108 (Minn. App. 2024), *review denied* (Minn. Dec. 17, 2024). The Reporters also depict the manifestly unreasonable exception as "fully consistent" with Minnesota law, including *Kallio*. Restatement (Third) of Torts § 2, **Reporters' Note**, cmt. *d*, § II.A. That conclusion is sound. *Holm and Bilotta* established "an objective standard." *Bilotta*, 346 N.W.2d at 622. *Kallio* said that alternative-design evidence is "normally" necessary to meet that standard. 407 N.W.2d at 95-97. *Kallio* Footnote 8 left open a narrow door for rare cases in which such evidence is not required. *Id*. at 97 n.8. Minnesota law has not fleshed out what satisfies that exception. But the Restatement does, and in a way that fits with Minnesota's objective standard. As one scholar previously observed,

> The Minnesota Supreme Court has not yet had its exploding cigar case, but the court has structured design defect law in Minnesota to provide for it when the match is lit. That does not mean that the need for a reasonable alternative design is irrelevant in Minnesota. The court's decision in Kallio clearly notes the general need for that proof in a design case. While Minnesota differs in minor respects, Minnesota law in general seems consistent with the Restatement (Third) position on design defect cases.

Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Prods. Liab*., 24 Wm. Mitchell L. Rev. 1, 21 (1998) (footnotes omitted).

D. Response to Critics

Some argue that the manifestly unreasonable standard sets the bar too high. Gary Wilson, Vincent Moccio & Daniel O'Fallon, *The Future of Products Liability in America*, 27 Wm. Mitchell L. Rev. 85, 101 (2000). But the standard's demands serve an important function: they supply an *objective* benchmark for determining whether a design makes a product unreasonably dangerous. An objective benchmark is necessary to meet the "objective" reasonable-care balancing test. *See Bilotta*, 346 N.W.2d at 622. An alternative, feasible, safer design is one such benchmark. *See Kallio*, 407 N.W.2d at 96. A manifestly unreasonably design—marked by an extreme risk of danger that substantially outweighs negligible utility—is another. Without either, design-defect liability would risk turning on little more than subjective intuition and sympathy. "If the limits [on liability] cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability would become arbitrary and capricious." *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980). The rare-case exception—if untethered to the manifestly unreasonable standard—could not be consistently and meaningfully applied. Verdicts would become unpredictable, as the rare-case exception increasingly swallowed the general alternative-design rule.

The manifestly unreasonable standard cannot be fairly dismissed as some pro-defendant addition to the Restatement. The written works of the Reporters, Professors

James Henderson and Aaron Twerski, showed that "neither scholar could be pigeonholed as 'pro-plaintiff' or 'pro-defendant.'" Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability-the American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 752 (1998). The manifestly unreasonable exception was not in their first draft of the Restatement. Aaron D. Twerski, *Inside the Restatement*, 24 Pepp. L. Rev. 839, 846 (1997). The exception was proposed by Robert Habush, "a highly respected plaintiff's lawyer," Henderson, Twerski, *Arriving at Reasonable Alternative Design*, 30 U. Mich. J.L. Reform at 587, and former president of the plaintiffs' attorney association, the Association of Trial Lawyers of America, Schwartz, *The Restatement (Third) of Torts*, 26 Hofstra L. Rev. at 753, now called the American Association for Justice, https://www.justice.org/about-us/aaj-history. Some critics decried the Habush Amendment as "an unholy compromise." See Henderson, Twerski, *Arriving at Reasonable Alternative Design*, 30 U. Mich. J.L. Reform at 588 & n.54 (citing Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. Tex. L. Rev. 385, 398-99 n.62 (1995)). One critic urged that including the exception would "invite[] plaintiffs' lawyers to challenge a variety of necessarily dangerous products, including such common and popular products as cigarettes, alcohol, handguns, three-wheel all-terrain vehicles, trampolines, and above-ground pools." Michael J. Tdoke, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment D Caveat Should Be Removed from the Restatement (Third)*, 81 Cornell L. Rev. 1181, 1184 (1996). The Reporters found merit with such concerns. They did not want to craft an exception that would be "so broad so as to include products such as motorcycles, adult lawn darts, or water skis." Henderson, Twerski, *Arriving at Reasonable Alternative Design*, 30 U. Mich. J.L. Reform at 585. "On the other hand," as they have explained, they "did not want to reject summarily the possibility that liability might be established in some instances based on the unusually high risk and almost worthlessness of the product." *Id*. at 586-87. They reasonably threaded that needle by adopting the manifestly unreasonable exception, even though the exception's caselaw support was (and remains) "so slender a thread." *Id*.

The manifestly unreasonable standard is a principled way to maintain the line between courts and regulators. Courts recognize that legislatures and administrative agencies are better positioned to decide whether "widely used and consumed" but dangerous products should remain on the market. Restatement (Third) of Torts § 2, Comment, cmt. d. The utility and basic safety that leads to a product becoming widely used and consumed is irreconcilable with the standard's requirement that the product's utility be "negligible," especially when paired with the requirements that the risk of danger be extremely high and substantially outweigh the product's utility. The standard is thus a principled way to prevent ad-hoc product regulation through tort verdicts, which follow a few weeks of trial, and which would bypass regulatory processes and potentially override regulatory decisions.

The standard also makes sense from an ex-ante safety perspective. If design-defect liability may be imposed for designs that are neither manifestly unreasonable nor chosen instead of an alternative, feasible, safer design, manufacturers are left to guess whether a jury might deem their design choices to be unreasonable. That uncertainty does little to improve safety and much to increase unpredictable liability exposure.

VI. Conclusion

The Eighth Circuit's opinion in *McDougall* reaffirms established Minnesota design-defect law. Generally, a plaintiff must prove that an alternative, feasible, safer design existed. Only in a still-theoretical rare case might a plaintiff prevail without that proof. If courts are called on to flesh out what *Kallio's* rare-case exception requires, the Restatement's manifestly unreasonable standard provides a sensible guide. For now, real-world examples of the rare case remain as elusive as the exploding cigar.

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As *McDougall* shows, winning on appeal begins at trial. Jeff Markowitz worked as appellate counsel at trial. He played an active role, advising the manufacturer's trial counsel and drafting motion papers, to ensure that issues were preserved for appeal. Jeff then was lead appellate counsel on appeal. He, with colleague Beth Prouty, proudly teamed up with trial counsel: Bob Gilbertson, Virginia McCalmont, and David Wallace-Jackson.