No. 125262

In the Supreme Court of Illinois

DALE GILLESPIE and CHRISTINE GILLESPIE, *Plaintiffs-Appellees,* v. EAST MANUFACTURING CORPORATION, *Defendant-Appellant,* and ROBERT EDMIER, THOMAS EDMIER, TRAIL QUEST, INC., *Defendants.*	Appeal from the Appellate Court of Illinois, First District, No. 1–17–2349 There Heard on appeal from the Circuit Court of Cook County, Illinois, No.: 13 L 8261 The Honorable John H. Ehrlich, Judge Presiding

APPELLANT'S ADDITIONAL BRIEF AND APPENDIX

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NATURE OF THE CASE

This appeal arises from a complaint alleging claims of negligent design and strict product liability related to steps on the front of a dump trailer. The trial court granted summary judgment to East Manufacturing Corporation (East) with respect to both the negligence and strict liability claims. The appellate court reversed the grant of summary judgment only with respect to the strict liability claims (A19/¶67), noting that plaintiffs Dale and Christine Gillespie "did not challenge the trial court's granting of summary judgment… on the negligence counts" (A7/¶22 n.2).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly determine that Occupational Safety and Health Act (OSHA) regulations and other trade group standards that do not apply to the manufacture of dump trailers were not relevant to determine whether the dump trailer was defective?

2. Did the trial court correctly determine that East was entitled to summary judgment with respect to plaintiffs' strict liability claims?

STATEMENT OF JURISDICTION

The trial court entered its order granting summary judgment in favor of East on October 3, 2017 (C3008), and made a Rule 304(a) finding on October 11, 2017 (C3013). Plaintiffs filed a timely notice of appeal on October 12, 2017. (C3014.) The appellate court had jurisdiction over plaintiffs' appeal under Ill. S. Ct. R. 304(a).

The judgment of the appellate court was initially entered on June 12, 2019, and subsequently published on August 7, 2019. The appellate court denied East's petition for rehearing on August 15, 2019. This Court granted East an extension of

time until October 24, 2019, to file its petition for leave to appeal. Having allowed East's timely petition on January 29, 2020, this Court has jurisdiction under Ill. S. Ct. R. 315.

STATEMENT OF FACTS

Plaintiff Dale Gillespie fell while climbing out of a custom-built frameless aluminum dump trailer (the Trailer).At the time of the accident, Dale was employed by Barge Terminal Trucking, Inc. The trailer he was using was owned by Trail Quest, Inc. and leased to Barge.

Dale and his spouse, Christine Gillespie, filed suit against: (1) East, the manufacturer of the trailer; (2) Trail Quest, Inc.; and (3) Robert and Thomas Edmier, the principals of both Trail Quest and of Barge. As to East, plaintiffs asserted design defect claims sounding in both negligence and strict liability, and a strict liability claim for failure to warn. East successfully moved for summary judgment as to all claims asserted by plaintiffs. (C2005.) On appeal, plaintiffs did not challenge the entry of summary judgment on their negligence claims against East (A7/¶22 n.2), so only the strict liability claims are before this Court.

I. Evidence and Argument Presented on Summary Judgment

A. Background

1. Manufacture, Sale and Lease of the Trailer

Trail Quest is a leasing company which purchases trucks and trailers for lease to Barge. In 2011, Barge was "looking for a trailer that was larger than the majority of [its] other [trailers] that had the capability of hauling lightweight products, but yet the capability to haul [its] regular products." (C1926.) Robert Edmier (Edmier), in his twin capacities as president of Trail Quest and Secretary-Treasurer of Barge,

"worked with Ken's Truck Repair to order a trailer that would fit that need." (C1917, C1926.) Edmier discussed Barge's desire for a 70-yard capacity trailer with Jim Rohr, the Vice President of Ken's Truck. (C1926.) Over the years, Ken's Truck has purchased between 300 and 500 dump trailers from East. (SupC170.) Together, Edmier and Rohr developed the specifications for a dump trailer to be built by East and purchased by Trail Quest from Ken's. (C1926–27.)

East manufactures three basic families of trailers: (1) flatbed or platform; (2) dump trailers; and (3) refuse trailers (a category which includes walking floor trailers). (C2421.) Dump trailers can be either frame-style or frameless, and can be constructed out of steel or aluminum. (C2387, C2424, C2507.) The trailer involved in this case (the Trailer) was a 2012 Genesis II aluminum frameless dump trailer. (C691.) The "Genesis" model of frameless dump trailer was developed to minimize drag by providing smooth rather than corrugated exterior panels. (C2423.) "Genesis" refers to these smooth exterior panels rather than to any particular configuration. (SupC63.) The panels are manufactured from sheets of aluminum. (SupC76.)

Ed Coffman, East's product engineering manager (C2382), testified that steps rather than a rung-style ladder are standard on the front of Genesis II dump trailers because that has been the standard in the dump trailer industry since at least 1972. (C2384, C2385–86.) "Cast steps have been around forever." (C2386.) Rung-style ladders, by contrast, are standard equipment on solid waste hauling equipment manufactured by East. (C2392.) Rung-style ladders "seems to be the industry norm in the solid waste" industry. (C2392–93.)

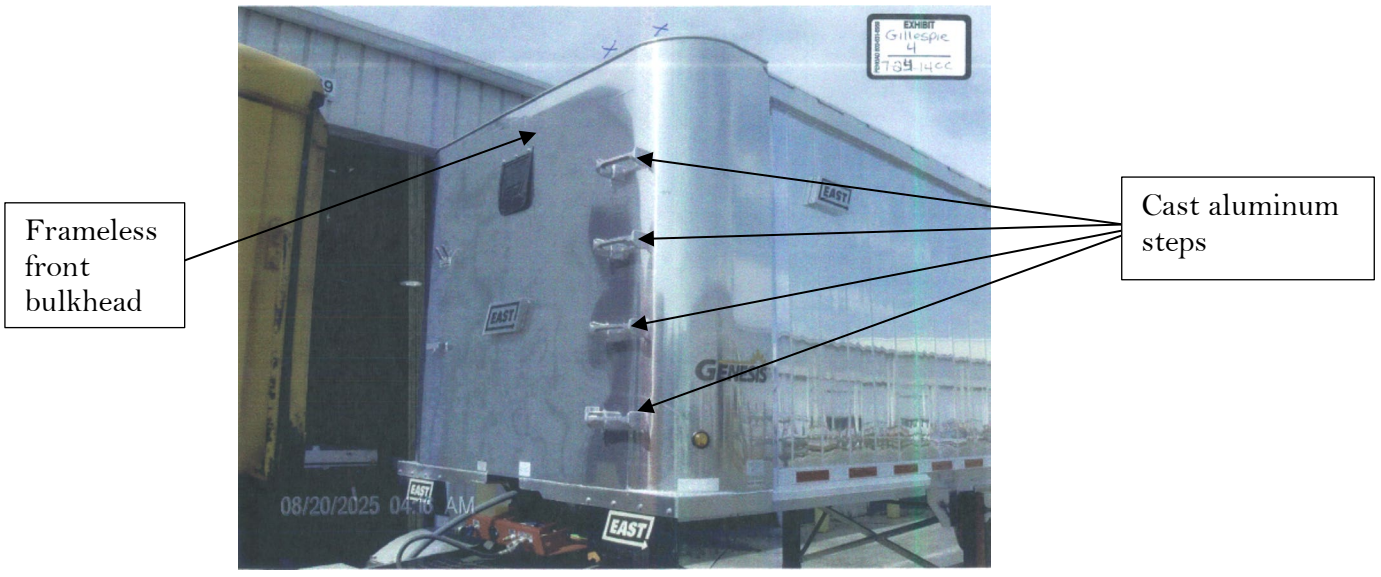
The steps are made of cast aluminum with a diamond pattern on the treads to prevent slipping. (C2394.) On a 78-inch tall trailer, the top step would be installed 19

inches from the trailer's top edge. The three steps below the top step are typically spaced 15 to 16 inches apart. (C2394, C2560.) East has been installing the top step no closer than 19 inches from the top edge of its dump trailers to accommodate tarp systems used by some customers since late December 2009. (C2398.) Coffman explained:

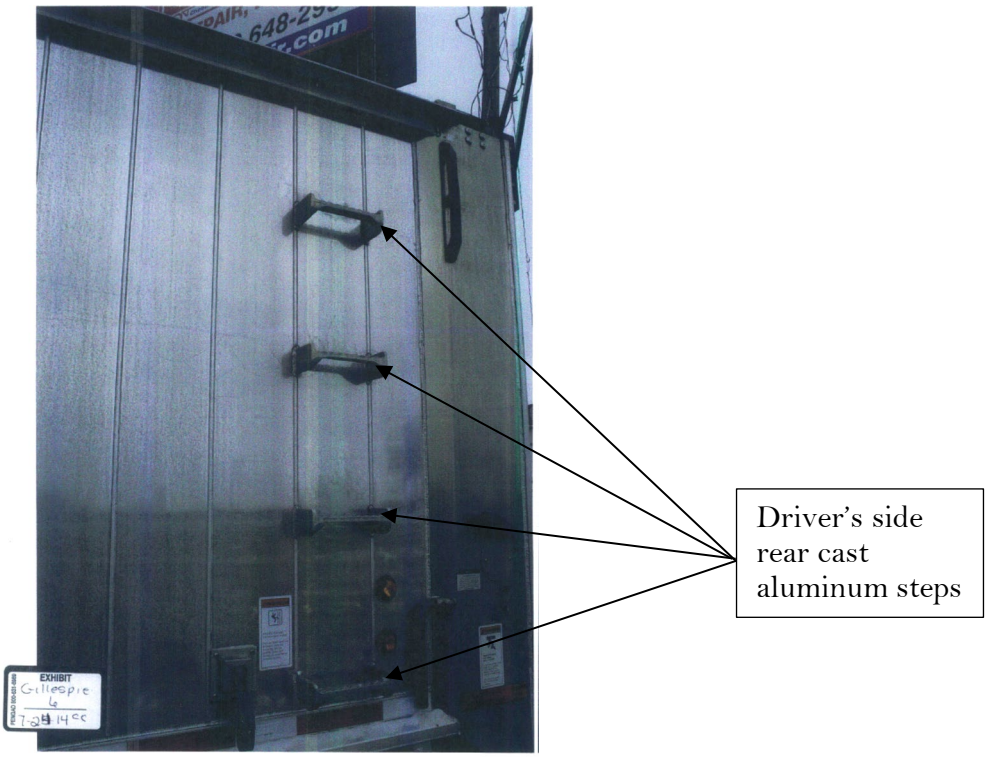
> The tarp mechanisms that they used, sometimes the tarp overlaps 18 inches down the side, so if you put a step, obviously it's up under the tarp, and then this was to keep it down out of the way. Specifically on the front, a fabric nose cap on a tarp comes down over the front of the trailer approximately 18 inches. So if you have a step there, you can't fasten the tarp.

(C2398.)

Each individual Genesis II trailer manufactured by East is designed "based on the sales order… to build what the customer wants." (C2384.) That is, "most [East] trailers are made to order." (C2400.) This particular Genesis II trailer was built to the dimensions provided to East by Ken's Truck: 39-feet long, 102-inches wide, and 78-inches high. (C1926; C2045; C2047–48.) The Trailer was manufactured with four cast aluminum steps welded onto the front bulkhead of the Trailer:



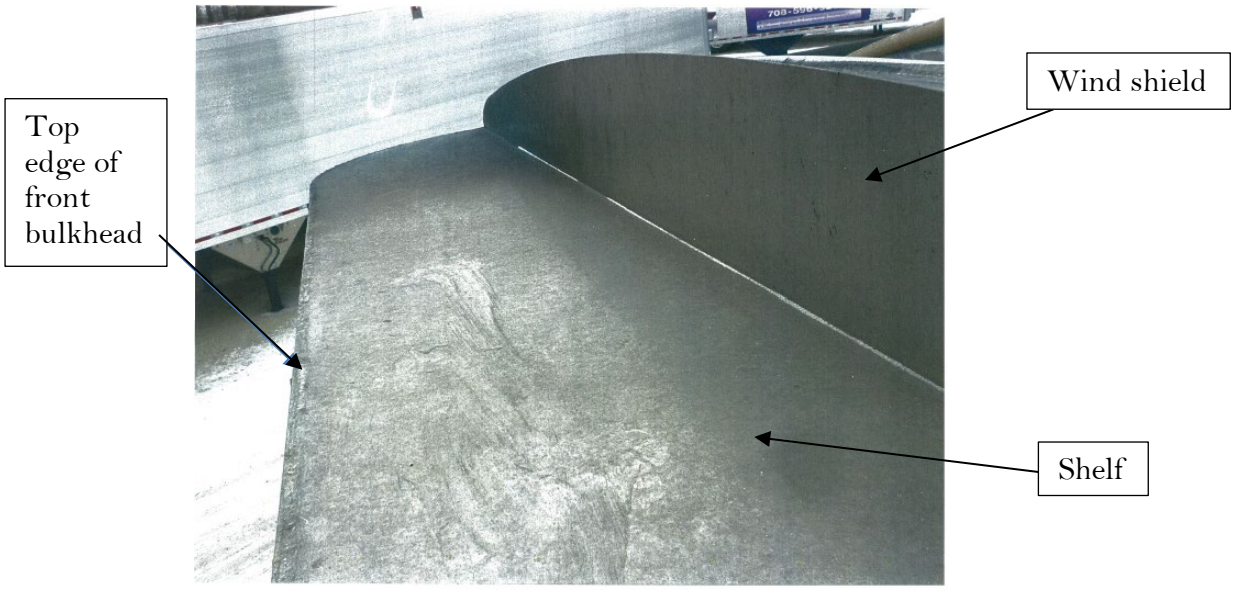
(C2049, SupC160.) A second set of steps was installed on the driver's side panel at the rear of the Trailer:



(C2708, SupC160.) Edmier testified that these steps were "the same steps that come on every other East trailer [Trail Quest and Barge had] ever ordered." (C1932.).

Dump trailers often include a tarp over the load to protect or contain the material they transport. (C479.) East does not ordinarily install tarp systems on the trailers it manufactures, leaving such installation to customers themselves. Because the Trailer "was too big for the standard tarp" Trail Quest normally used on its trailers, Trail Quest "had Ken's install the tarp that he thought would work the best." (C433.) Thus, after taking possession from East, Ken's modified the Trailer by installing a Shur-Co tarp system, including the tarp, tarp bows, and a tarp cap that covered the dump opening and the bulkhead at the front of the trailer. (C514, C2410, SupC161, SupC163.)

The Shur-Co tarp system installed on the Trailer is one of a large number of different tarp systems available. (C2447; SupC78; SupC111.) Steven Knight, Shur-Co's vice president of engineering, testified that he knew of "at least six different companies that [had] copied Shur-Co caps" and 30 companies that sell tarps similar to Shur-Co's. (SupC113.) Shur-Co alone "sells over 100 different cap configurations." (SupC113.) The Shur-Co tarp cap installed on the Trailer was Shur-Co's universal aluminum tarp cap, a cap that can be modified to fit multiple trailers. (SupC109, SupC161.) The universal cap is comprised of a roof panel, shelf, and wind shield welded together. (SupC115.) The shelf is approximately 18 to 20 inches deep, from the bulkhead to the wind shield. (SupC113.) The wind shield is between 6 and 14 inches high, "depending on what the customer asked for." (SupC114.) The roof panel is about 12 inches deep. (SupC126.) The cap was bolted onto the top rail of the Trailer. (SupC112, SupC115.)



(C2050.)

Trail Quest completed its purchase of the dump trailer from Ken's Truck and took possession of it in August 2011. Trail Quest, in turn, leased the trailer to Barge, plaintiff's employer. (C1918–19.)

2. Use of the Trailer

Coffman explained the standard process for loading a dump trailer with a front-end loader. The driver of the trailer would pull into a loading site. The operator of the front-end loader would direct the driver where to park. (C2389.) The driver would then climb the steps on the front of the trailer "to direct the loader operator who's loading the back of the trailer with bulk material." (C2389.) The loader operator would then move to the front of the trailer to load that end, and the driver would use the steps at the back of the trailer to observe the loading. (C2389.) The driver can "direct the loader operator… whether he needs to back up to center the load" because "if it's loaded off center, when you raise the trailer up in the air, it can cause a trailer to fall over. (C2389.) Coffman indicated that it is possible that a driver would climb into the trailer to rake a load and make it even, but "[v]ery rarely do people do that." (C2389.)

When Gillespie first began working at Barge in 1998, he rode along with another Barge driver for two weeks. (C1885–86.) The Barge driver demonstrated to Gillespie how to use the steps:

> He would get out—when he had to go up there on top of the trailer to watch them load up, he wouldn't let me do it. He said, I don't want you up there, I don't want you to slip and fall because you're not an employee. He said, I will go up watch the loader load me. Basically that was it.

(C1886.)

According to Rohr, Barge did not intend for its drivers to use the steps on the front bulkhead to climb into the Trailer. (SupC175.) When ordering the trailer from Ken's Truck, Edmier informed Ken's that Barge was not going to use the front steps to climb into the Trailer. (SupC176.) According to Edmier, drivers typically used the steps on the front bulkhead only to observe the loading of the trailer. (C1933.) Drivers usually used the steps at the rear side panel if they needed to climb into the trailer because it is extremely difficult to get in at the front with that tarp system. (C1933.) The tarp cap also "covered up the steps on the inside of the bulkhead" so that they were no longer usable. (C2410.) The rear/side steps provide a more controlled means of access. (C1948.) Edmier instructed Ken's Truck to install two additional steps on the inside of the driver's side rear panel because, "if ever there was a need for anybody to get in, …the rear is much safer." (SupC176.)

According to Knight, the Shur-Co "tarp system is simply there to cover the load in the trailer. It's not structural." (SupC112.) Knight explained that the tarp "caps are made out of thin aluminum" and are of a size adequate to support the tarp. "That's all they're designed to support." (SupC112.) The "user is not to climb on [the tarp cap], to stand on it. It's not used to access the trailer." (SupC112.) Shur-Co supplies a label when it sells the tarp kit that warns: "Do not walk or stand on the end caps." (SupC114.) This warning is also included in the owner's manual supplied by Shur-Co with the tarp kits it sells. (SupC114.) "Ken's Trucking did not put any warnings on this particular trailer regarding standing, climbing or walking on the tarp cap" when it installed the tarp system on the Trailer. (SupC173.)

3. Gillespie's Accident

Gillespie estimated that he had been using the Trailer for a year to a year and a half prior to his accident. (C1855.) Gillespie used the Trailer exclusively from the time it was delivered to Barge until the date of his accident. (C1873.) Gillespie would typically work five days per week, and would go up and down the front bulkhead steps on the Trailer three to six times per day. (C1858, C1885.) He used the trailer "hundreds of times" without injury prior to his accident. (C1857.)

Gillespie testified that the first week that he had been using the Trailer, he told Edmier:

> [L]ook, the trailer I had before this had a catwalk, a full length ladder from the top to the bottom, and I had something to hang onto at the top. I said this trailer doesn't have that. It's dangerous. If I slip and fall from that high, it's going to hurt.

(C1857.) The previous trailer Gillespie was referring to "wasn't a dump trailer. It was a walking floor trailer." (C1885.) None of the aluminum trailers Barge had at the time of Gillespie's accident had catwalks or rung-style ladders. (C1889.) All of Barge's full-frame aluminum trailers had grab handles installed at the top of the bulkhead, but neither of Barge's frameless aluminum trailers had this feature. (C1891.)

The steps on the Trailer were similar to those on the trailer Gillespie rode along on for his training period and to the other trailers Gillespie had used at Barge prior to receiving the Trailer. (C1885, C1886.) There was nothing unusual about the steps in comparison to the rest of his experience pulling dump trailers. (C1877.) Gillespie had no complaints or criticisms about the number or height of steps on the Trailer, "because the steps weren't [his] issue." (C1880, C1883.) His "issue was something to hold onto." (C1880.)

Gillespie testified that on the day of his accident, he believes he was the first truck to arrive at the yard in Ottawa for loading. (C1862.) Gillespie pulled up to the ramp and the loader operator, Terry Harvey, loaded Gillespie's Trailer with 70 yards of mulch using a front-end loader. (C1854, C1860, 1878.) Harvey beeped when he was finished loading and Gillespie pulled off to the side so that, if there was a truck behind him, it could "pull up to the ramp to get loaded because we get paid by the load and by the mile." (C1860.) Gillespie explained that "everyone is in a hurry most of the time." (C1860.)

After pulling out of the way, Gillespie threw a pitchfork into the Trailer for raking down the load and climbed up into the Trailer. (C1860.) Once he got to the top, Gillespie would bring his "right knee up to the top of the trailer and kind of pull [him]self up with [his] hands flat on the top of the" tarp cap. (C1860.) He then scooted over the where he could get inside on top of the load. (C1860.) Gillespie explained that "You have to go in and rake the load down, distribute it equally, but, more importantly, you have to clean those bows off where the mulch is piled over the top of those bows, otherwise you can't roll the tarp over to cover the load." (C1860.)

The Trailer and the steps were wet at the time of Gillespie's accident. (C2630.) He described the process of climbing out of the trailer as follows:

> So what I do I just—I kind of like crawl over onto that piece of flat metal that goes over the front, and I just turn around while I'm on my hands and knees, and that's when I proceed to work my way down.
>
> And how I work my way down is I would put my right knee—leave my right knee on top of that trailer and bring my left foot down to that first step.
>
> * * *
>
> The day of my accident, after I had my foot planted on that first step, I went to bring my right foot down so I can grab that second step with

> my right foot. As I was doing that, it's when my hands slipped off the top of the trailer, and then my left foot started to slip. So now I had to grab that first step where my left foot was and keep that from falling—to keep myself from falling backwards and landing on my back or my head.

(C2632.) Gillespie estimated that he fell approximately ten feet and landed on his feet. (C2632.)

After his fall, Gillespie delivered the load to Plainfield and then returned to the Ottawa yard to preload the Trailer for the following day. (C1865–66.) Gillespie went up and down the steps on the Trailer one more time after preloading, but did not climb into the Trailer to level the load. (C1866.) Instead, Gillespie had the loader load his trailer with only 50 yards of mulch "so the load would not have to go up over those bows." (C1866.)

B. Design Defect Claim

Plaintiffs' design defect claims against East revolved around two alleged defects in the design of the Trailer from which Gillespie fell. First, plaintiffs claimed that the size and spacing of the steps on the front bulkhead of the Trailer failed to comply with certain government regulations and industry standard. (C2054–55.) Second, plaintiffs claimed that the addition of the tarp cap, which eliminated the intended handhold provided by the top edge of the Trailer's bulkhead, was a foreseeable post-sale modification of the Trailer. (C2057.)

1. Compliance with Regulations and Standards

In moving for summary judgment, East argued that the Trailer was not unreasonably dangerous because the cast steps it installed on the front bulkhead of the dump trailer complied with industry standards for safety as well as all regulations governing trailers. (C2016–17.) East pointed to Coffman's testimony that

steps, and not rung-style ladders, have been the been the industry standard since at least 1972 (C2386) and that he had never seen a rung-style ladder on a Genesis II frameless dump trailer (C2392). (C2016–17.) Rohr agreed that steps rather than a rung ladder are standard equipment for any manufacturer of an aluminum dump trailer. (C2016, citing SupC160.) Gillespie's accident was the only incident any witness was aware of involving a fall from the steps of a dump trailer.

Nevertheless, plaintiffs insisted in their response to East's summary judgment motion that the design of the dump trailer was defective because the steps on the front bulkhead did not comply with safety standards promulgated by OSHA, the Federal Motor Carriers Safety Regulation (FMCSR), and the American National Standards Institute (ANSI), and recommended practices of the Truck Trailer Manufacturers Association (TTMA).

OSHA: Plaintiffs argued that the size and spacing of the steps violates OSHA §1910.23(b)(2) and (4), (d). (C2054–55, citing 29 C.F.R. §1910.23(b)(2) and (4), (d).). This regulation was adopted by a final rule published in the Federal Register on November 18, 2016, and effective January 17, 2017. Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494, 82980 (18 Nov. 2016). Plaintiffs' safety expert, Gary Hutter, pointed to an earlier OSHA fixed ladder regulation in effect at the time of the accident (see C2177, citing 29 C.F.R. §1910.27 (Lexis 2012)), but plaintiffs did not discuss the application of that regulation in their opposition to summary judgment.

East argued that these requirements did not apply here for two reasons. First, the regulation "speak[s] of the responsibilities of an 'employer' with regards to safety and East is not [Gillespie's] employer." (C2993.) In addition, East argued that

the OSHA requirements did not apply to ladders affixed to motor vehicles, including tractor trailers. (C2994.)

FMCSR: In addition, plaintiffs argued that the width of the steps violated FMCSR §399.207(b)(4). (C2055, citing 49 C.F.R. §399.207(b)(4).) Hutter conceded: "As far as I can tell the Federal Motor Carrier Safety Administration does not have a stand-alone standard specific and unique to the access way on a trailer of the type we're talking about here." (C2221.) Hutter had "not looked at all the Federal motor vehicle regulations that there are," and indicated that he had "not offered any opinions in that regard that they were violated." (C2268.)

Again, East argued that this regulation does not apply to the steps on the Trailer. (C2997.) Rather, this provision applies to "trucks and truck-tractors, having a high profile cab-over-engine (COE) configuration, for entrance, egress and back of cab access." 49 C.F.R. §399.203.

ANSI: Plaintiffs argued that the spacing of the steps violated §5.1.1 of the ANSI standard for fixed ladders. (C2055.) Again, East argued that this standard does not apply to the steps on a dump trailer. (C2996.) The ANSI fixed ladder "standard is intended for application to the type of structures depicted and described in the standard (i.e., buildings, wells, and shafts)." (C2119 at §1.5.1.)

TTMA: Finally, plaintiffs argued that the steps installed on the Trailer violated §5.4 and §5.5 of the TTMA Recommended Practice for Tank Trailer Ladders and Walkways (Recommended Practice) addressing the width and vertical spacing of steps. (C2055, C2141; see C2143 at §5.4 and §5.8.) The TTMA Recommended Practice specifies that it "is intended to serve as a guide for the uniform design and construction of ladders and walkways on liquid tank trailers,"

and "may be applied to truck tanks and dry bulk trailers to the extent practicable." (C2142 at §2.3, §2.4.) East argued that the Recommended Practice is not relevant because the Trailer is not a tank trailer or dry bulk trailer. (C2996.)

Hutter agreed that "trailers can have multiple types of trailers and dump trailer is just one subset." (C2282.) He testified that the Recommended Practice, "is a standard for tanks, but it can also apply to bulk material trailers." (C2234.) East's expert, Fred Monick, testified that the Trailer "is not a bulk trailer." (C2505.) Monick explained that "[a] dry bulk trailer is basically a tank trailer that holds dry material." (C2474.) A dry bulk trailer "has the same geometry, same configurations" as a tank trailer. (C2773.) A dry bulk trailer "[b]asically… looks like a tank trailer, but it's not liquid." (C2474.) "If you Google 'dry bulk trailer,' you do not get anything that remotely resembles the trailer in question." (C2505.)

2. Feasibility of Alternative Design

In opposing summary judgment, plaintiffs argued that they had "presented evidence of a feasible alternative design based on the fact that East has a much safer, OSHA-compliant, full-length rung ladder and a catwalk, which it installs on other types of trailers." (C2061.) To support his opinion "that there were feasible design alternatives available to East" (C1254), Hutter pointed to a photograph of a rung-style ladder in East's product catalogue. (C2197.) While the photograph did not include any dimensions, Hutter testified that, "just ballparking it, it kind of generally looks like the kinds of geometry and spacing that are required per the OSHA, ANSI, SAE and general industry with regards to ladders." (C2197.) Plaintiffs attached the specification sheet for the ladder identified by Hutter as an exhibit to their opposition

to summary judgment. (C2332.) That ladder is 98 ¼ inches high with 12 ¼-inch wide rungs spaced 12 inches apart. (C2332.)

Hutter did not produce a proposed alternative design for integrating the rung-style ladder he identified into the design for the Trailer. Hutter testified:

> It's not my job nor is it my responsibility to design an adequate ladder for a company that has a product that needs a ladder. Those designs are well defined in the codes, they're well defined by the standards, they're well defined by the industry. And, in fact, East has and has bought appropriate kinds of ladders as far as I can tell from their description that would have complied as far as I can tell from their description would have complied with those standards, whether they're ANSI standards, OSHA standards, National Safety Council standards or the design practice in the industry standards, custom and practice standards, but I have not designed it nor do I need to.

(C2196.)

Coffman confirmed that a rung-style ladder is available as an option for trailers that East sells (C2384), but he has never seen a rung-style ladder installed on a Genesis II frameless dump trailer (C2392). Cast steps are standard on that type of trailer. (C2384.) Rung-style ladders are typically installed on trailers used for hauling solid waste, because that is the standard preference of customers in the waste hauling industry. (C2393.) Robert Edmier, who ordered the Trailer from Ken's Truck, testified that he did not know whether this particular dump trailer could have been ordered with a rung-style ladder. (C1934.)

Multiple witnesses questioned the feasibility of installing a rung-style ladder on the Trailer. For example, Andy Grow (East's director of engineering and warranty) testified that the rung-style ladder East installs on other trailers may not be feasible on trailers with certain types of tarp systems. He also opined that a trailer with a rung-style ladder would not be safe to use if a tarp cover were installed on the top front of the trailer. (SupC78, SupC80.) According to Grow, the cast aluminum

steps that come standard on Genesis II style trailers are safer in some respects because the tread on the steps is more resistant to slippage than the extruded metal rungs on the rung-style ladder. (SupC78.) (East does not itself manufacture rung-style ladders for installation on trailers, but purchases those ladders from a supplier. SupC69, SupC70.))

Rohr testified that a installing a rung-style ladder on the front bulkhead of a dump trailer "would cause a safety issue on grabbing electrical lines" because a "dump trailer, when it's extended, the whole front end, it comes exposed to being in an over-height situation of the trailer." (SupC178.) Rohr testified that he has seen "trailers melted to the ground because it hit hot lines" as a result of over-height issues. (SupC179.) Monick similarly testified that installing a ladder on the front bulkhead "does raise some issues" because "you're extending the height of the trailer," creating "a greater chance of falling in the wires, which is kind of a big deal with these things." (C2508.) Rohr indicated that the addition of grab handles on the tarp cap would also contribute to potential over-height issues. (SupC181.)

Rohr also testified that installing grab handles on the front of the Trailer would not be helpful because they would be too close to the top step. (SupC181.) Coffman testified that the only place that grab handles could be installed on the Trailer as manufactured by East "would be on the face of the bulkhead right above the steps or beside the steps." (C2390.) Coffman explained that a grab handle in that location would not increase safety because the top of the bulkhead as manufactured by East already provided a place to grab. (C2391.) In addition, Coffman testified that a handhold on the face of the bulkhead would actually be more dangerous because "now you're having to bend over head first to grab the rail." (C2404.)

Monick testified that it would not be feasible for East to install a grab handle above the top step on the bulkhead because it was necessary to leave the "top 19 inches of the trailer free and clear of steps and grab handles to allow… the purchaser of the trailer to install a tarp system of its choosing on the trailer." (C2487.) A manually installed tarp, for example, will "wrap around the trailer and they come down about that far. So you don't want the tarp coming over a step or even a top of a ladder." (C2487.) Rohr testified that installing grab handles on top of the tarp cap installed by Ken's Truck would not have been feasible because the Shur-Co tarp cap is not heavy enough to support grab handles. (SupC181.)

3. Post-Sale Modification

East additionally argued that it was entitled to summary judgment because the addition of the tarp cap was an alteration made to the Trailer after it left East's control, which created the dangerous condition that resulted in Gillespie's fall. (C2014.) This is because the tarp cap covers up the top edge of the bulkhead of a trailer and eliminates a driver's ability to use the top edge as a handhold. (C2412, C2434–35.) According to Grow, the addition of the tarp cap would make it more dangerous if a user were to climb over the tarp cap into the Trailer "[b]ecause there's nothing to grab onto anymore. You're taking away the lip of the trailer." (SupC79.)

Plaintiffs argued that East could nevertheless be held liable for the danger created by the tarp cap because it was "foreseeable that a tarp system and tarp cap would be installed on the trailer after purchase." (C2057.) Coffman testified that, when Ken's Truck placed the order for this Trailer with East, no indication was given that the purchaser intended to install a tarp cap after purchase. (C2412.) The

Production Build Sheet for the order simply indicates that no tarp, bow holders, tarp bows, tarp basket, or tarp hooks were to be installed by East. (C2047.) Rohr agreed that East does not "know [Ken's Truck's] customer" and does not know what tarp system [the customer is] requesting" when it manufactures a trailer for Ken's Truck. (SupC174.)

In fact, Rohr testified, whether a customer is likely to install a tarp system at all "depends on the use of the trailer" and the type of material the customer intends to haul (SupC171.) And the fact that a tarp is installed does not necessarily mean that a tarp cap will be installed. Charles Wells, East's vice president of sales and marketing (C2417), explained that not all tarps require a tarp cap at the front of the trailer. (C2447.) When a cap is required, there are a variety of different types available for installation, including soft, hard, aluminum, and vinyl. (C2447.) Shur-Co alone sells over 100 different cap configurations, (SupC113.) East "would have no way of knowing what [Ken's Truck's] customer is requesting for a tarp," Rohr testified, "so why would they input that when I order a trailer from them?" (SupC174.)

Grow acknowledged that, as an engineer, he could anticipate that a purchaser might install a tarp and tarp cover on a trailer manufactured by East. (SupC79.) Grow added that he would "also anticipate that the people putting it on know what they're doing." (SupC79.) Both Coffman and Charles Wells confirmed that when East puts a tarp cap on the front end of a trailer, it always installs a grab handle. (C2412, C2434.) No evidence was presented as to what type of tarp cap East has installed on trailers, but Coffman testified that the Shur-Co universal cap installed on the Trailer is not one of the tarp caps East installs. (C2412.) Grow testified that East "can't

speculate on all the different tarp configurations and everything that's going to happen" after a trailer is delivered to the customer and suggested that requiring East to do so would be like holding GM "responsible because somebody put different tires on the car and the tire blew out." (SupC80.)

C. Failure to Warn Claim

In opposing summary judgment, plaintiffs' explained that their "failure to warn claim is based on East Manufacturing[']s] complete failure to provide any instructions, directions or warnings to purchasers that grab handles were needed if a tarp cap was installed." (C2064.) In support, plaintiffs pointed to Wells' testimony that "that there were no documents whatsoever recommending grab handles and East never generated any warnings about the need for grab handles." (C2064, citing C2431.) According to plaintiffs, East "knew that grab handles were needed if a tarp cap was installed to give the driver something to grab onto" and "knew that customers would commonly be installing tarps and tarp caps after purchase." (C2064.)

"Since there's different tarp systems and tarp caps," Grow testified that East could not anticipate and put a warning for every type of different system on" its trailers. (SupC87.) "[I]f the tarp system and end caps and tarp caps placed on a trailer by some aftermarket installer… somehow changed the way a driver or user could get in and out of the trailer off the top of the trailer," Grow testified that he would anticipate or expect that [the aftermarket installer] would issue some kind of warning to the drivers or the users." (SupC87.)

And, indeed, Knight testified that Shur-Co provided a warning with its tarp kit, both in the owner's manual and as a decal that could be adhered directly to the

trailer. (SupC111.) That warning instructs, among other things: "Do not walk or stand on the end caps." (SupC114.) East argued that instructing trailer purchasers to install grab handles any time any tarp cap is installed would not have made the Trailer safer, but would instead have encouraged users to climb over the tarp cap, contrary to Shur-Co's warning for this particular tarp cap. (C3003.)

Rohr testified that Ken's Truck did not provide any warning that it would be dangerous to climb into the Trailer using the front bulkhead steps with the tarp cap in place because Edmier informed him that they weren't going to be using the front steps to climb inside the Trailer. (SupC176.) According to Rohr, Edmier instructed Ken's Truck to "install two extra steps on the inside of the rear" because "if ever there was a need for anybody to get in, the rear is a much safer" option. (SupC176.) "If it was improper or unsafe to use the front steps of the trailer," Rohr "would… have expected or relied on… Edmier to communicate that to the eventual drivers of the trailer." (SupC176.)

II. Trial Court Ruling

"[B]ased on the parties' written submission[s] and without oral argument," the trial court granted East's motion for summary judgment. (A21/SupR241.) The trial court observed that "[t]he record indicated that East had been building dump trailers for many years and that this particular dump trailer met industry standards." (A24/SupR244.) "The court further noted that Gillespie testified that his hands slipped off the aluminum cap over the tarp" and that "[n]either the tarp nor the tarp cap was on the dump trailer at the time it left East's manufacture." (A24/SupR244.) Thus, "the court concluded that the dump trailer was safer when it left East's manufacture than when it left Ken's where it had been modified." (A24/SupR244.)

The trial court rejected plaintiffs' argument that additional safety features should have been installed by East "based on OSHA requirements or trade group standards." (A24/SupR244.) The court held that: (1) "OSHA does not apply to dump trailers"; (2) "the dump trailer sold in this case met the industry's custom and practice"; and (3) "the [Trail Quest defendants] and Ken's got the kind of dump trailer they had ordered." (A24–25/SupR244–45.) "The court concluded that, as to a custom product that is safe as manufactured but later modified into an unsafe product by a third party, the incentive to ensure product safety lies with the party requesting a potentially unsafe feature and the party modifying the product to add that feature." (A25/SupR245.)

III. Appeal

On appeal, plaintiffs argued that the evidence was sufficient to establish the existence of an unreasonably dangerous product defect under both the risk-utility and consumer expectations tests. The appellate court found that only three factors in this case were relevant to the risk-utility analysis: "(1) the dump trailer's conformity with government regulations, (2) conformity with the applicable industry standards, and (3) the availability and feasibility of alternate designs." (A13/¶42.) The appellate court acknowledged that East "complied with industry standards" (A14/¶46), but rejected East's argument—and the trial court's holding—that OSHA regulations do not apply. (A13/¶¶43–44.)

"Having determined that OSHA is a relevant standard for the jury to consider, [the appellate court] further [found] that ANSI, FMCSR, and TTMA standards are also relevant for the jury's consideration." (A14/¶45.) Finally, the appellate court held that plaintiffs produced evidence supporting the claims that a

feasible alternative design was available. (A14/¶47.) Based on this analysis, the appellate court concluded that the evidence, when viewed in the light most favorable to plaintiffs, was sufficient to create a genuine issue of material fact as to whether the trailer was unreasonably dangerous under the risk-utility test. (A14/¶48.)

Turning to the consumer expectation test, the appellate court held that "the fact finder could conclude that a truck driver would reasonably expect steps to be constructed with proper spacing and with side rails" because "the purpose of the cast iron steps on the front end of the dump trailer is to allow drivers to climb in and out of the dump trailer." (A15/¶¶50, 52.) Again, the appellate court held that "OSHA and ANSI standards are relevant for the purposes of" this analysis. (A15/¶53.)

The appellate court rejected the trial court's determination that the dump trailer was safe when it left East's manufacture, reasoning that "a genuine issue of material fact remains as to whether it was foreseeable that purchasers would install tarp covers and caps and whether the presence of a grab handle would be necessary." (A17/¶59.) Based on this same reasoning, the appellate court held that a question of fact existed as to whether East had a duty to warn purchasers that grab handles would needed if a tarp cap were installed.

The appellate court reversed the entry of summary judgment as to strict liability and remanded for further proceedings. (A19/¶67.)

ARGUMENT

I. Standard of Review

"Because this appeal arises from the appellate court's reversal of a circuit court order granting summary judgment, [this Court's] review is *de novo*." *Jones v. Pneumo Abex LLC*, 2019 IL 123895, ¶21. This Court is "not bound by the reasons

given by the lower courts for their judgments and may affirm on any grounds which are called for by the record." *In re Estate of Funk*, 221 Ill. 2d 30, 96 (2006).

II. The trial court properly granted summary judgment in favor of East as to plaintiffs' strict product liability claim.

A plaintiff "may demonstrate a product has been defectively designed 'in one of two ways.'" *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 255 (2007) (quoting *Lamkin v. Towner*, 138 Ill. 2d 510, 529 (1990)). A plaintiff can "present evidence that the product fails to satisfy the consumer-expectation test" or "that the risk of danger inherent in the challenged design outweighs the benefits of such design." *Id.*, at 255.

A. Summary judgment was proper under the risk-utility test.

In reversing the trial court's grant of summary judgment, the appellate court held that plaintiffs presented sufficient evidence to create a genuine issue as to whether the trailer was unreasonably dangerous based on the risk-utility test. "Under the risk-utility test… '[t]he utility of the design must… be weighed against the risk of harm created' and '[i]f the likelihood and gravity of the harm outweigh the benefits and utilities of the product, the product is unreasonably dangerous.'" *Id.*, at 259 (quoting 63A Am. Jur. 2d *Products Liability* §978, at 146–47 (1997)).

Courts may consider numerous factors, including but not limited to: "the availability and feasibility of alternate designs at the time of its manufacture, or that the design used did not conform with the design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation." *Id.*, at 263–64 (quoting *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368 (1979)). "[T]he following factors may also be relevant: '(1) the appearance and aesthetic attractiveness of the product; (2) its utility for multiple uses; (3) the convenience and extent of its use, especially in light of the period of time

it could be used without harm resulting from the product; and (4) the collateral safety of a feature other than the one that harmed the plaintiff.'" *Id.*, at 265–66 (quoting American Law of Products Liability 3d §28:19, at 28–30 through 28–31 (1997)). Courts may consider the open and obvious nature of the danger, "[t]he user's ability to avoid danger by the exercise of care in the use of the product," and "[t]he user's anticipated awareness of the dangers inherent in the product." *Id.*, at 263, 264 (quoting J. Wade, *On The Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837–38 (1973)).

In reversing the trial court's grant of summary judgment under the risk-utility test, the appellate court considered three factors relevant: "(1)… conformity with government regulations, (2) conformity with the applicable industry standards, and (3) the availability and feasibility of alternate designs." (A13/¶42.) Each of those factors, however, along with additional factors the appellate court did not consider, favor the trial court's grant of summary judgment in favor of East.

1. Government regulations and industry standards not applicable to East or the dump trailer are irrelevant.

In considering the factor of conformity with government regulations, the appellate court found that "OSHA is a relevant standard in this case" and, as a result, "ANSI, FMCSR, and TTMA standards are also relevant for the jury's consideration." (A13–14/¶44–45.) The trial court had reached precisely the opposite conclusion, finding that "OSHA does not apply to dump trailers" and that "there was no evidence in the record indicating that the industry has standards for features used to get on or off a dump trailer." (A24/SupR244). The appellate court erred.

This Court has long approved the admissibility of evidence as to both government regulations and industry standards "to aid the trier of fact in

determining the standard of care in a negligence action" or "in determining whether a condition is unreasonably dangerous." *Ruffiner v. Material Service Corp.*, 116 Ill. 2d 53, 58 (1987). To be admissible, however, such standards must first satisfy a foundational threshold: the "standards must be relevant 'in terms of both time and conduct involved.'" *Id.* (quoting *Murphy v. Messerschmidt*, 68 Ill. 2d 79, 84 (1977).)

This Court's opinion in *Rucker* illustrates the proper application of this principle in the strict product liability context. In *Rucker*, the decedent was killed when a liquified petroleum gas (LPG) tank car manufactured by the defendant exploded. *Rucker v. Norfolk & Western R. Co.*, 77 Ill. 2d 434, 436 (1979). On appeal, the defendant argued that the trial court erred in excluding evidence of its "compliance with Federal standards for the construction of LPG tank cars." *Id.*, at 436–37. This Court agreed, holding that the defendant "should be allowed to show that a given alternative design is not required by Federal regulations" and that such evidence "is relevant in determining 'whether the complained-of condition was an unreasonably dangerous defect.'" *Id.*, at 438 (quoting *Kerns v. Engelke*, 76 Ill. 2d 154, 163 (1979)).

Importantly, the regulation at issue in *Rucker* directly governed the construction of LPG tank cars, the specific product at issue in that case. As this Court took care to emphasize, it approved the admission in a strict product liability action of "evidence… that a *product*, not a manufacturer's conduct, conforms to Federal standards." *Id.*, at 439 (emphasis added). In other words, in the strict product liability context, standards regulating required or prohibited features of a particular product are admissible as evidence of a product defect; standards regulating conduct are not. See also *Baley v. Federal Signal Corp.*, 2012 IL App (1st) 093312, ¶56 ("In

strict liability cases based on design-defect, the proper inquiry belongs with the product and not the conduct of the manufacturer.")

In granting East's motion for summary judgment, the trial court recognized that the OSHA regulations and industry standards plaintiffs relied on failed to satisfy this foundational threshold. "OSHA does not apply to dump trailers," the trial court explained, and "there was no evidence in the record indicating that the industry has standards for features used to get on or off a dump trailer." (A24/SupR244.) By contrast, the appellate court held simply "that evidence of a product's compliance with government safety standards is relevant and admissible in a product liability case to determine whether the product is defective"—without ever considering whether the standards to which it pointed actually apply to the product at issue. (A14/¶44.)

The appellate court's failure to apply the foundational requirement imposed by this Court resulted in an erroneous holding that OSHA regulations and other industry guidelines are *always* admissible as evidence of an unreasonably dangerous product defect, regardless of whether those regulations and guidelines apply to the product at issue. The appellate court's judgment should be reversed and the trial court's judgment affirmed.

a. The OSHA regulations at issue apply to employers, not manufacturers.

"OSHA safety regulations are promulgated to ensure workplace, not consumer, safety." *McKinnon v. Skil Corp.*, 638 F.2d 270, 275 (1st Cir. 1981). Specifically, the OSHA regulation upon which plaintiffs relied provides that "[t]he *employer* must ensure that each ladder used meets the requirements of this section 29 C.F.R. §1910.23(a) (emphasis added). Each and every subparagraph of the

regulation reiterates that the "*employer* must ensure" that the particular requirements of each subparagraph are satisfied. 29 C.F.R. §1910.23(a), (b), (c), (d) and (e) (emphasis added).

Importantly, in imposing obligations on employers, "OSHA is not precluded from promulgating… regulations requiring safety precautions beyond those considered reasonable in the industry." *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978). Accord *McKinnon*, 638 F.2d at 275 ("An OSHA safety regulation, therefore, may impose a standard of conduct upon employers greater than that which would be considered reasonable in the industry.") As a result, courts across the country have generally "'been reluctant to permit evidence of OSHA regulations in actions against manufacturers' for fear 'that manufacturers would be unfairly held to standards that were not intended to be imposed upon them.'" *Byrne v. Liquid Asphalt Systems*, 238 F. Supp. 2d 491, 492 (E.D.N.Y. 2002) (quoting *Sundbom v. Erik Riebling Co.*, No. 89 Civ. 4660 (JSM), 1990 U.S. Dist. LEXIS 11297 (S.D.N.Y. Aug. 28, 1990)).

As discussed above, this Court in *Rucker* approved the admission of evidence in a strict product liability context "that a *product*, not a manufacturer's conduct, conforms to Federal standards." *Rucker*, 77 Ill. 2d at 439 (emphasis added). Because "OSHA regulations pertain only to employers' *conduct*" (*Minichello v. U.S. Industries, Inc.*, 756 F.2d 26, 29 (6th Cir. 1985), emphasis added), such regulations will rarely be admissible under the standard announced in *Rucker* as evidence of a product defect in a strict liability action against a manufacturer. Put simply, "a manufacturer cannot comply with standards that do not apply to the manufacturer's conduct." *Hughes v. Lumbermens Mutual Casualty Co.*, 2 S.W.3d 218, 224 (Tenn. Ct. App. 1999). And a

product cannot conform to standards that do not govern the required features of a product.

Prior to the appellate court's decision in this case, it appears that only two published decisions in Illinois had directly addressed the admissibility of OSHA regulations as evidence of a product defect in a strict product liability action. See *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430 and *Turney v. Ford Motor Co.*, 94 Ill. App. 3d 678 (1st Dist. 1981). In both *Zickuhr* and *Turney*, the appellate court reached the question of admissibility despite observing that the issue had not been adequately preserved. *Zickuhr*, 2011 IL App (1st) 103430, at ¶64; *Turney*, 94 Ill. App. 3d at 685. In each case, the appellate court reached a different conclusion.

In *Turney*, the plaintiff brought a strict liability action against Ford Motor Company for injuries sustained while operating a Ford-manufactured tractor. *Turney*, 94 Ill. App. 3d at 680. At trial, Ford's expert testified that the "type of tractor [at issue was] exempt from the OSHA requirements of roll bar and seat belt when used in orchards because the overhead clearance was low when working around trees." *Id.*, at 682. On appeal, the plaintiff argued that Ford should not have been permitted to cross-examine the plaintiff's experts regarding OSHA regulations, including "OSHA regulations relating to instances where roll bars were not required." *Id.*, at 685.

The appellate court noted that, on cross-examination of plaintiff's expert, Ford had asked several questions based on the OSHA regulations without objection from plaintiff and that a "failure to object results in a waiver of the issue." *Id.* Assuming the issue was properly before it, the court concluded that the evidence was properly admitted. *Id.* First, the appellate court pointed to this Court's holding in *Rucker* that, in a strict product liability action, evidence "that a given alternative

design is not required by Federal regulations… is relevant in determining whether a defect is unreasonably dangerous." *Id.* In addition, the *Turney* court cited *Pyatt v. Engel Equipment, Inc.*, 17 Ill. App. 3d 1070 (3rd Dist. 1974), for the proposition that "evidence of standards imposed on employers was not barred merely because the action was against the manufacturer." *Turney*, 94 Ill. App. 3d at 685.

Approximately 30 years later, the appellate court in *Zickuhr* reached the opposite conclusion. In *Zickuhr*, the plaintiffs claimed that the decedent had developed mesothelioma from exposure to asbestos-containing electrical cable that had been manufactured by the defendant. *Zickuhr*, 2011 IL App (1st) 103430, at ¶4. The defendant attempted to introduce OSHA asbestos regulations into evidence at trial, "claiming the OSHA regulations showed the asbestos-containing wire did not require a warning label because the fiber it foreseeably released fell within the permissible exposure limit." *Id.*, at ¶28. "[T]he trial court excluded this evidence, citing that OSHA regulations apply only to employer-employee relationships, and since the decedent was not defendant's employee, OSHA regulations were irrelevant." *Id.*

The appellate court affirmed. The court noted that the "defendant cite[d] no case law that identifies instances where the OSHA asbestos regulation was applied to a manufacturer," while the "plaintiffs cite[d] cases from several other jurisdictions that held manufacturers, who are not employers, are not regulated under OSHA." *Id.*, at ¶66. "Since the OSHA asbestos regulations [did] not apply to defendant," the appellate court concluded, "evidence of the regulations [was] irrelevant" and was properly excluded. *Id.*, at ¶69.

Although this Court has yet to address the admissibility of OSHA regulations in the context of a strict product liability action against a manufacturer, this Court did approve the admissibility of such regulations as evidence of an employer's standard of care in a negligence action under the Federal Employers' Liability Act (FELA). *Schultz v. N.E. Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260 (2002). In *Schultz*, the plaintiff "alleged that he was seriously injured while performing his duties when he fell off a retaining wall." *Id.*, at 264. This Court held that plaintiff's expert was properly permitted to testify "that various safety standards, including OSHA, recognize a change in elevation as a safety hazard" and that, in his opinion, "a change in elevation should be protected by a guardrail." *Id.*, at 298. Such testimony, this Court explained, "was simply intended to support [the] expert['s] opinion that defendant was negligent in failing to install a guardrail above the retaining wall." *Id.*, at 299. The regulations were admissible as evidence of the standard of care even though the defendant "did not violate OSHA by failing to install a guardrail above the retaining wall." *Id.*, at 293, 298.[1]

Like *Schultz*, numerous courts outside of Illinois have approved the admission of OSHA standards as some evidence of the standard of care applicable to an employer in an action based on negligence. See *Robertson v. Burlington Northern R.R.*, 32 F.3d 408, 410 (9th Cir. 1994) ("OSHA standards may be admitted in an FELA case as some evidence of the applicable standard of care.") Accord *Ries v. AMTRAK*,

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[1] Although this Court indicated that the regulations were "not binding on defendant," the opinion as a whole makes clear that the regulations more precisely were "not binding on defendant" with respect to the area above the retaining wall. See, e.g., *Lee v. Norfolk Southern Ry.*, 802 F.3d 626, 633 (4th Cir. 2015) (OSHA applies to railroads with respect to workplace safety except "in the area of 'railroad operations'").

960 F.2d 1156, 1162 (3d Cir. 1992) (violation of OSHA regulation "would only be evidence which could be considered by a jury in trying to determine whether an employer acted negligently"); *Albrecht v. Baltimore & O. R. Co.*, 808 F.2d 329, 332 (4th Cir. 1987) (in negligence action, "regulations promulgated under . . . [OSHA] provide evidence of the standard of care exacted of employers") (quoting *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 707 (5th Cir. 1981)). But, while *Schulz* held that OSHA regulations were admissible as evidence of an employer's standard of care, it did not hold that such regulations were admissible in an action against a non-employer manufacturer.

Because the focus in a negligence action is on the reasonableness of the defendant's *conduct*, OSHA standards governing an employer's conduct are relevant in determining an *employer's* standard of care. By contrast, as this Court highlighted in *Rucker*, the focus in a strict product liability action is on the condition of the product, not on the manufacturer's conduct. *Rucker*, 77 Ill. 2d at 439. Thus, an OSHA regulation governing the conduct of an employer and not the required features of a particular product simply is not "relevant 'in terms of both time and conduct involved.'" *Ruffiner*, 116 Ill. 2d at 58 (quoting *Murphy*, 68 Ill. 2d at 84.) Contrast *Bailey v. V & O Press Co.*, 770 F.2d 601, 608 n.5 (6th Cir. 1985) (a safety regulation that "generally requires a particular safety feature as opposed to placing the legal responsibility for providing such a feature on one other than the manufacturer" may be admissible in strict product liability context).

The OSHA regulation upon which plaintiffs relied in this case, 29 C.F.R. §1910.23, is expressly limited to the conduct of employers: "The *employer* must ensure that each ladder used meets the requirements of this section." 29 C.F.R.

§1910.23(a) (emphasis added). The regulation does not govern safety features required on dump trailers. Indeed, the regulation specifically excludes any ladder which is "[d]esigned into or is an integral part of machines or equipment." 29 C.F.R. §1910.23(a)(2).

OSHA explained at length that its regulations prior to the adoption of a final rule in 2016 did not "include specific requirements to protect workers from falling off rolling stock and motor vehicles" and OSHA did not include any such requirements in the 2016 final rule. 81 Fed. Reg. 82494, 82505 and 82509. (SupC223, SupC227.) Federal standards are admissible as evidence of a product defect, only where the evidence shows "that a product, not a manufacturer's conduct, conforms to Federal standards." *Rucker*, 77 Ill. 2d at 439. Because the OSHA standards on which plaintiffs rely do not govern the features required on a dump trailer, the trial court correctly concluded that those standards are irrelevant here.

Manufacturers do not have a duty "to make OSHA-compliant products" "simply because employers are subject to OSHA regulations." *Almonte v. Averna Vision & Robotics, Inc.*, 128 F. Supp. 3d 729, 744 n.9 (W.D.N.Y. 2015). "Some employers choose to make OSHA-compliant modifications after the sale on their own" rather than "require their manufacturers to make OSHA-compliant products." *Id.* Courts should not "assume that manufacturers voluntarily assume the responsibility of making OSHA-compliant products, especially where the industry standard might be less onerous than the OSHA regulation." *Id.*

In holding that OSHA is a relevant standard in this case, the appellate court failed to recognize that the standard governs employer conduct rather than product

features. Under this Court's holding in *Rucker*, the appellate court's conclusion was in error.

b. The OSHA, ANSI, and FMCSR standards, and TTMA recommended practices do not apply to dump trailers.

In addressing compliance with industry standards, the appellate court held that East "complied with industry standards." (A14/¶46.) This portion of the appellate court's holding appears to be limited to the custom and practice within the dump trailer industry. The appellate court treated the question of "design guidelines provided by an authoritative voluntary association" (*Calles*, 224 Ill. 2d at 263–64)—plaintiffs' arguments based on ANSI, FMCSR, and TTMA—separately. As the appellate court acknowledged, however, the evidence was undisputed that the steps installed on the Trailer have been the standard in the dump trailer industry since 1972.

Nevertheless, without any analysis of whether the ANSI standards, FMCSR regulations, or TTMA recommended practices apply to the Trailer, the appellate court held: "Having determined that OSHA is a relevant standard for the jury to consider, we further find that ANSI, FMCSR, and TTMA standards are also relevant for the jury's consideration." (A14/¶45.) As with evidence of governmental standards, evidence of industry or trade guidelines "must be relevant 'in terms of both time and conduct involved.'" *Ruffiner*, 116 Ill. 2d at 58 (quoting *Murphy*, 68 Ill. 2d at 84.)

The appellate court's decision stands starkly at odds with this Court's holding in *Ruffiner*. In *Ruffiner*, the plaintiff brought claims against a towboat owner for unseaworthiness after he fell from a ladder while working on the vessel. *Ruffiner*, 116 Ill. 2d at 55. (Determining whether a condition renders a vessel unseaworthy is

analogous to determining whether a condition is unreasonably dangerous in a product liability action. *Id.*, at 58.) The plaintiff's expert opined that the pilot-house ladders on the boat were unsafe, "bas[ing] his opinion on a set of [ANSI] standards" that "prescribed certain guidelines and dimensions for the construction of fixed ladders." *Id.*, at 56–57.

The defendant in *Ruffiner* argued, and this Court agreed, "that the ANSI standards were not shown to be relevant to the circumstances" of that case. *Id.*, at 58. First, this Court observed that "it [did] not appear that the ANSI standards were intended to apply to the sort of special arrangement required" aboard the towboat. *Id.*, at 59. Further, this Court explained, while "[t]he ANSI standards would be applicable to fixed ladders in factories, power stations, and other land-based industrial facilities…[, t]he ladders in question were on a towboat not in a factory or other industrial plant." *Id.* "Because the plaintiff did not show that the ANSI standards were relevant 'in terms of … [the] conduct involved'," this Court held that "the evidence should not have been admitted." *Id.*

As in *Ruffiner*, the ANSI fixed-ladder standard upon which the plaintiffs' relied did not apply to the Trailer. To the contrary, the ANSI fixed-ladder standard "is intended for application in the type of structures described in the standard (i.e. buildings, wells, and shafts)." (C2119 at §1.5.1.) Neither the plaintiffs nor their expert identified any ANSI standard for ladders on a motor vehicle or trailer.

Similarly, the FMCSR requirements cited by plaintiffs apply by their express terms "to all trucks and truck tractors having a high profile cab-over-engine (COE) configuration." 49 C.F.R. §399.203. (C2153.) A dump trailer is not a truck or truck tractor, much less a truck or tractor with a COE configuration.

The TTMA recommended practice upon which the plaintiffs relied indicates that it "is intended to serve as a guide for the uniform design and construction of ladders and walkways on liquid tank trailers" and "may be applied to truck tanks and dry bulk trailers to the extent practicable." (C2831 at §§2.3 and 2.4.) The dump trailer at issue was not a liquid tank trailer, truck tank, or dry bulk trailer. (C2742.)

And, as discussed above, the OSHA regulation upon which plaintiffs rely does not apply to ladders on motor vehicles.

On appeal, the plaintiffs did not contend that any of these guideline regulate steps on a dump trailer, but instead argued that "[e]ven where such standards are not binding on the defendant, they represent evidence of the standard of care." (Pl. App. Br. at 14, quoting *Schultz*, 201 Ill. 2d at 298.) But a strict product liability action does not involve a "standard of care." In a strict product liability case, the focus is not on the defendant's standard of care but on whether the product is in an unreasonably dangerous defective condition. *Rucker*, 77 Ill. 2d at 439, accord *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 97 (2005) ("In contrast to negligence[action]'s focus on the standard of care established by other manufacturers in the industry, strict liability focuses on the product…").

Ruffiner, which directly addressed the admissibility of standards to establish whether a condition was unreasonably dangerous, controls in this strict product liability action; *Schultz* does not. Under *Ruffiner*, before evidence of standards will be admissible in evidence, the proponent of that evidence must demonstrate the relevance of the standard to the conduct involved. *Ruffiner*, 116 Ill. 2d at 58. Because none of the standards upon which plaintiffs rely apply to dump trailers, the appellate court erred in concluding that these standards were relevant in this case.

c. Inapplicable regulations and standards cannot be presented under the guise of providing a basis for an expert's opinion.

Although plaintiffs did not argue—either before the trial court or in the appellate court—that OSHA regulations were admissible for the limited purpose of explaining the basis of Hutter's opinion, admission of the regulations even for this limited purpose would be improper. "[A]n an expert's opinion is only as valid as the reasons that underlie it." *Schultz*, 201 Ill. 2d at 299. Thus, facts or data underlying an expert's opinions are ordinarily admitted 'for the limited purpose of explaining the basis for the expert witness' opinion.'" *Chicago v. Anthony*, 136 Ill. 2d 169, 185 (1990) (quoting *People v. Anderson*, 113 Ill. 2d 1, 12 (1986)). Nevertheless, "a trial judge need not allow an expert to state the underlying facts or data of his opinion 'when [their] probative value in explaining the expert's opinion pale[] beside [their] likely prejudicial impact or [their] tendency to create confusion.'" *Id.* "If another rule of law applicable to the case excludes the information sought to be relied upon by the expert, the information may not be permitted to come before the jury under the guise of a basis for the opinion of the expert." *Id.*, at 186.

Here, allowing Hutter to testify that he based his opinion that the steps were unsafe on his belief that the steps violated OSHA regulations would likely confuse the jury as to whether East had an obligation to comply with the OSHA regulations. In addition, the probative value of such testimony would be negligible at best—reference to the regulations would not assist the jury in understanding *why* the step size and spacing was allegedly dangerous but instead would merely bolster Hutter's opinion by lending it an aura of federal authority. And given that the OSHA regulation does not apply to East or to the Trailer, implying to the jury that this

federal regulation is somehow authoritative here would be grossly prejudicial. Plaintiffs cannot present inadmissible evidence of the OSHA regulation under the guise that it is a basis for their expert's opinion. *Id.*, at 186.

In *Merritt v. Raven Co.*, 706 N.Y.S.2d 233, 235 (App. Div. 2000), for example, the plaintiff's expert "concede[d] that there are no Federal or State regulations requiring ladders or steps on trailers." Nevertheless, plaintiff's expert relied on OSHA "standards regulating the safety practice of employers, not manufacturers, to support his opinion" that a trailer bulkhead lacking steps, ladders, or handholds was defectively designed. *Id.*, at 236. The court held that "this proffer was woefully inadequate to raise a triable issue as to the design defect claim," particularly given the expert's qualifications "as a licensed professional engineer and an investigator of accidents resulting from 'product failure'" without "any practical experience in the field of truck and trailer design *Id.*

In any event, even if the OSHA regulation were otherwise admissible, whether substantively or to demonstrate the basis for Hutter's opinion, the fact that this regulation does not apply to dump trailers or their manufacturers renders it irrelevant in applying the risk-utility test. While "conformity with any *applicable* industry standards and governmental regulations" is properly considered under the risk-utility test (A13/¶42 (emphasis added), citing *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶85), this Court has never held that conformity to *inapplicable* regulations is an appropriate factor under that test.

2. Plaintiffs failed to show a safer design was feasible.

As to the feasibility of alternative designs, a "product may be found unreasonably dangerous based on a design defect" only "if the plaintiff presents

evidence of an alternative design that is 'economical, practical and effective.'" *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 525–26 (2008) (quoting *Kerns*, 76 Ill. 2d at 162–63). "[A] manufacturer's product can hardly be faulted," after all, "if safer alternatives are not feasible." *Kerns*, 76 Ill. 2d at 163 (quoting *Sutkowski v. Universal Marion Corp.*, 5 Ill. App. 3d 313, 319 (3rd Dist. 1972)). Nor can a manufacturer be faulted if feasible alternative designs are not safer. "[A]lthough evidence of a feasible design alternative is sometimes used to describe the risk-utility test, it is but one of several factors in the risk/benefit analysis." *Wortel v. Somerset Industries*, 331 Ill. App. 3d 895, 904 (1st Dist. 2002).

Here, the appellate court concluded that a rung-style ladder "was a reasonable alternative to the standard cast iron stairs" based on testimony that such "a ladder was available for other models and was also available upon request for the dump trailer." (A14/¶47.) In the abstract, there is no dispute that rung-style ladders are features that can feasibly be built. The relevant inquiry, however, is not whether such a feature exists in the abstract but, more concretely, whether a rung-style ladder could feasibly have been incorporated into the specific dump trailer at issue—and, if so, whether doing so would have rendered the dump trailer as a whole safer. Plaintiffs presented no evidence that a rung-style ladder could feasibly have been installed on the specific trailer at issue in this case or that installing a rung-style ladder would have made the trailer any safer.

Hutter testified that a rung-style ladder of some sort should have been installed, instead of the cast aluminum steps, on the Trailer from which Gillespie fell. Hutter did not, however, provide any proposed design for incorporating a rung-style ladder into the Trailer at issue here. Simply pointing to a photograph in East's

catalogue of a rung-style ladder—unspecified dimensions which Hutter "ballpark[ed]" as incorporating "the kinds of geometry and spacing" specified by various standards—does not establish that it would have been feasible to install that ladder on the Trailer. (C2197.)

Hutter's opinion that it would have been feasible to install the exemplar ladder on the Trailer was premised on a false assumption that "East makes that exact trailer with the option of that ladder for use as standard equipment when it's used for waste hauling." (C2220.) This assumption is not borne out by any evidence. Coffman testified that "solid waste [hauling] is completely different from what you would use a frameless [dump trailer] for." (C2413.) Rohr similarly confirmed that the type of trailer used to haul waste is "entirely different" from a dump trailer. (SupC160.) The type of trailer used for waste hauling "is generally 48 feet long or better with 100 inch sides or greater" (C2392), while the frameless dump at issue here was 39 feet long with 78-inch sides (C2045). While rung-style ladders are routinely installed on trailers used for waste hauling per customer preference (C2413), trailers used for waste hauling are not the "exact trailer" at issue here. Coffman testified that he has never seen a rung-style ladder on any Genesis II frameless dump, much less on one with the particular dimensions and configuration of the Trailer at issue here. (C2392.)

Multiple witnesses identified potential issues that could be created in attempting to install a rung-style ladder on the Trailer. Installation of such a ladder could create a dangerous over-height situation." (SupC178–79, C2508.) In addition, the tread on the standard cast aluminum steps are more resistant to slippage than the extruded metal rungs on the rung-style ladder. (SupC78.) Plaintiffs presented no evidence of an alternative design that resolves those issues.

Although establishing a feasible alternative design "does not require actually building the alternative design" (*Baley*, 2012 IL App (1st) 093312, at ¶81), mere unsubstantiated speculation does not suffice (*Volpe v. Iko Industries*, 327 Ill. App. 3d 567, 577 (1st Dist. 2002)). In *Volpe*, the appellate court rejected as "unsubstantiated and speculative" an expert's opinion that a safer alternative design was feasible where the expert did not build design a prototype or otherwise conduct testing to confirm that the proposed alternative design was feasible. *Id.* In *Baley*, by contrast, the appellate court held that an expert had sufficient basis for an opinion as to feasibility where the expert devised a computer model to demonstrate the feasibility of the proposed alternative design." *Baley*, 2012 IL App (1st) 093312, at ¶87.

Hutter asserted that it is not *his* "responsibility to design an adequate ladder for a company that has a product that needs a ladder." (C2196.) While that may be true, it *is* plaintiffs' burden to establish an unreasonably dangerous design defect. Without any sort of model or proposed design for incorporating a rung-style ladder into the design of the dump trailer, Hutter's opinion that an alternative design was hypothetically feasible remains unsubstantiated and speculative. This factor thus weighs against a finding of a design defect.

3. Cast-aluminum steps are routinely used on dump trailers without injury.

Among the factors this Court has approved for consideration under the risk-utility test is "the period of time [a product] could be used without harm resulting from the product." *Calles*, 224 Ill. 2d at 265–66.

The type of cast metal step installed on the Trailer is standard in the dump trailer industry generally (C2386, C2413, C2425, SupC160) and for Genesis II dump trailers specifically (C2384). East has been making dump trailers since 1968 and

steps have been the standard for dump trailers since at least 1972. (C2385–86.) "Cast steps have been around forever" (C2386), and yet there is no evidence that anyone other than Gillespie has ever fallen from the cast steps of an East dump trailer. (See, e.g., C2438.) Edmier was not aware of any other injuries or incidents occurring over the past 30 years involving drivers climbing up a trailer. (C1934.)

Indeed, Gillespie himself used the Trailer, without harm resulting, "hundreds of times" over the course of at least five months prior to his accident. (C1783, C1787.) Prior to Barge's acquisition of the Trailer, Gillespie used a different dump trailer with the same type of steps without injury.

The length of time that the steps on the Trailer could be used without injury weighs against finding a design defect under the risk-utility test.

4. Gillespie was aware of the obvious danger of attempting to climb over the tarp cap.

The open and obvious nature of the danger and "[t]he user's anticipated awareness of the dangers inherent in the product" are additional factors which should be considered under the risk-utility test. *Calles*, 224 Ill. 2d at 263, 264. "[T]he law generally assumes that persons who encounter [open and obvious] conditions will take care to avoid any danger inherent in such condition." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996).

"The danger of falling from a height has been held by this court to be open and obvious," even to a "child old enough to be allowed at large." *Sollami v. Eaton*, 201 Ill. 2d 1, 14 (2002). But even if that danger were not obvious, a warning decal was affixed to the Trailer warning, in all caps, of the "FALLING HAZARD," which could "cause injury or death." (C2692.) Gillespie acknowledged that he knew he needed to be careful when using the steps. (C1859.)

Gillespie also acknowledged that he was aware of the danger allegedly presented by the absence of a rung-style ladder and handholds. Gillespie testified that, the very first week he started using the Trailer, he complained to Edmier about the absence of a rung-style ladder and something to grab onto at the top. (C1857.) Gillespie acknowledged that he knew he "needed to be extra careful because [the Trailer] was lacking" those features. (C1856). He knew from that first week that if he were to "slip and fall from that high, [it was] going to hurt." (C1857.)

Given the obviousness of the danger of falling from a height and Gillespie's admitted awareness of the supposed danger created by the absence of a rung-style ladder and grab handles, these factors weigh against a finding of a design defect under the risk-utility test.

5. Gillespie could have readily avoided the danger by using the safer steps at the rear of the Trailer.

Finally "the collateral safety of a feature other than the one that harmed the plaintiff" and "[t]he user's ability to avoid danger by the exercise of care in the use of the product," are also relevant factors under the risk-utility test *Calles*, 224 Ill. 2d at 265–66. Here, Gillespie could have directed the loader to load his Trailer with less mulch so that the load would not pile up over the tarp bows and he would not have needed to climb onto the load to clean off the bows. This is precisely what Gillespie did when preloading the Trailer following the accident. (C1866.) Gillespie could also have used the steps on the rear of the driver's side panel of the Trailer, which provided a much safer means of ingress and egress from the Trailer.

Gillespie's ability to avoid the danger of which he was admittedly aware weighs against a finding of a design defect under the risk-utility test.

B. Summary judgment was proper under the consumer expectations test.

Before the appellate court, plaintiffs argued alternatively that they presented sufficient evidence to survive summary judgment under the consumer expectations test. Again relying on the OSHA and ANSI standards cited by plaintiffs, the appellate court concluded that a "reasonable truck driver, like… Gillespie, would expect that the steps would be properly spaced" in conformance with OSHA and ANSI criteria. (A15/¶53.) But plaintiffs did not preserve any argument under the consumer expectations test and failed to present any evidence that would support the trial court's conclusion even if they had.

1. Plaintiffs forfeited any argument under the consumer-expectations test.

Before the trial court, plaintiffs did not argue that they established a defective product design under the consumer-expectations test. Instead, they relied entirely on their theory that the steps on the dump trailer violated OSHA, ANSI, and FMCSR standards, and TTMA recommended practices, and that a feasible alternative design was available. Accordingly, plaintiffs have forfeited any argument under the consumer-expectations test.

2. The dump trailer performed as a typical user would expect.

Even if they had preserved the argument, plaintiffs failed to produce evidence sufficient to raise a genuine issue under the consumer-expectations test. In reversing the trial court's judgment based on the consumer expectations test, the appellate court suggested that a "reasonable truck driver… would expect that the steps would be properly spaced," and pointed to OSHA and ANSI criteria as evidence that the

steps on the Trailer were not properly spaced. This holding is flawed for two reasons.

First, as discussed above, the OSHA and ANSI standards are inadmissible because they fail to satisfy the threshold requirement of relevance in terms of time and conduct involved. See *Ruffiner*, 116 Ill. 2d at 58 (quoting *Murphy*, 68 Ill. 2d at 84.) The OSHA regulations impose a duty on employers, not manufacturers, to ensure a safe workplace. The ANSI standards apply to fixed ladders attached to buildings, wells, and shafts, not to steps or ladders affixed to dump trailers. (C2119 at §1.5.1.)

In addition, plaintiffs presented no evidence that typical dump trailer users expect steps on a dump trailer to comply with OSHA, ANSI, or any other standard. Before the appellate court, plaintiffs justified this absence of evidence by arguing that the consumer expectations test "usually does not require evidence of ordinary consumer expectations because the finder of fact may rely on its own experiences to determine what an ordinary consumer would expect." (Pl. App. Br. at 25, citing *Mele v. Howmedica, Inc.*, 348 Ill. App. 3d 1, 14 (1st Dist. 2004).) Along these lines, the appellate court stated that the consumer expectations "standard is objective and based on the average, normal, or ordinary expectations of the reasonable person and thus is not dependent upon the subjective expectation of a particular consumer or user." (A15/¶51, citing *Calles*, 224 Ill. 2d at 254.)

But both plaintiffs and the appellate court overlooked this Court's explanation in *Calles* that the "ordinary consumer" for purposes of the consumer expectations test is "the typical user and purchaser" of the product. *Id.*, at 257. Thus, the expectations regarding the Trailer's use and safety must be viewed from the perspective of a

typical user and purchaser of a frameless aluminum dump trailer. As that perspective is beyond the ken of the average juror, a jury in this case could not simply rely on its own experiences to determine what the typical user or purchaser of a dump trailer would expect. Evidence of those expectations was required.

And, in fact, the undisputed evidence consistently and unwaveringly established that the steps installed on the Trailer were exactly what typical users and purchasers of dump trailers expect. Coffman testified not only that the steps installed on the Trailer were the standard steps installed by East on all Genesis II frameless dump trailers, but also that such steps were standard throughout the dump trailer industry. Edmier never looked into whether the Trailer could have been purchased with a rung-style ladder because "[t]hese steps have worked good for us for 20 years." (C1934.) Over that period, the "vast majority" of trailers owned by Edmier (75 to 80) had steps without grab handles. (C1934.) Gillespie himself testified that there was nothing unusual about the steps on the Trailer in comparison to the rest of his experience pulling dump trailers.

Plaintiffs produced no evidence that the typical user or purchaser of a frameless dump trailer would expect a rung-style ladder or would expect steps with different spacing or dimensions. Accordingly, the consumer expectations test does not support reversal of the trial court's grant of summary judgment in favor of East.

C. East cannot be held liable for the substantial modification to the dump trailer made by Ken's Truck.

Finally, the appellate court held that "a genuine issue of material fact remains as to whether it was foreseeable that purchasers would install tarp covers and caps and whether the presence of a grab handle would be necessary to maintain three points of contact." (A17–18/¶59.) "Where a substantial alteration is made to the

product, it may defeat the plaintiff's claim that the defective condition existed at the time it left the manufacturer's control." *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill. 2d 335, 346 (1994). Thus, "[w]here an unreasonably dangerous condition is caused by a modification to the product after it leaves the manufacturer's control, the manufacturer is not liable unless the modification was reasonably foreseeable." (A16/¶56, quoting *Davis v. Pak-Mor Manufacturing Co.*, 284 Ill. App. 3d 214, 220 (1st Dist. 1996).)

"If a product is capable of *easily* being modified *by its operator*, and if the operator has a known incentive to effect the modification, then it is objectively reasonable for a manufacturer to anticipate the modification." *Davis*, 284 Ill. App. 3d at 220, (emphasis added). "Conversely, if the alteration of the product requires special expertise, or otherwise is not accomplished easily, then it is not objectively reasonable for a defendant to foresee the modification." *Id.* This is not a case where a product user disabled an easily modified safety feature—a modification which a manufacturer is required to anticipate. *Id.*, at 221. Rather, this is a case where a third party installed optional equipment at the request of the purchaser, creating a potentially dangerous condition that did not exist when the product left the manufacturer's control. A manufacturer that has "no way of knowing the ultimate user's needs cannot be held strictly liable for the post-sale selection and installation of optional equipment over which it has no control. *Ruegger v. International Harvester Co.*, 216 Ill. App. 3d 121, 127–28 (1st Dist. 1991).

Here, the tarp and tarp cap were installed by Ken's Truck, not by Gillespie or any other *operator* of the Trailer. Plaintiffs offered no evidence that a dump trailer operator would be capable of making this sort of modification at all, much less that

an operator could do so easily. Contrary to the appellate court's conclusion, it was not objectively reasonable to expect East to anticipate the installation of the tarp system and tarp cap. See *De Armond v. Hoover Ball & Bearing, Uniloy Division*, 86 Ill. App. 3d 1066, 1071 (4th Dist. 1980) (alteration not reasonably foreseeable to manufacturer where safety doors were removed by plaintiff's employer, not by plaintiff or any other machine operator).

And even if a manufacturer could be held responsible for a complex modification made by a retailer or by the product user's employer, it was not reasonably foreseeable to East that Ken's Truck would install this particular tarp system and tarp cap. First, whether a customer is likely to install any tarp system at all "depends on the use of the trailer" and the type of material the customer intends to haul. (SupC171.) Further, not all tarps require the installation of a tarp cap at the front of the trailer. (C2447.) And even when a tarp is installed and a tarp cap is required, a wide variety of different tarp caps are available for installation (C2447), with Shur-Co alone selling over 100 different tarp cap configurations (SupC113). East "would have no way of knowing what [Ken's Truck's] customer is requesting for a tarp." (SupC174.)

Under Illinois law, East was not required to anticipate every possible tarp system and tarp cap a customer might install or to anticipate and guard against all of the dangerous conditions that might be created by every conceivable configuration. Such a requirement would impose an impossible burden on manufacturers. In manufacturing the Trailer according to the specifications provided by Ken's Truck, East "was under no duty to inquire into the nature of the final use" of the Trailer "or

to investigate the nature of [Barge's] business." *Rotzoll v. Overhead Door Corp.*, 289 Ill. App. 3d 410, 417 (4th Dist. 1997).

Finally, even if East had some reason to anticipate that this specific tarp cap would be installed on the Trailer, it was not reasonably foreseeable that Ken's Truck would install a tarp cap that eliminates a user's ability to maintain three points of contact when using the front bulkhead steps to exit and descend from the Trailer without at the same time either modifying the Trailer to provide some alternative means of maintaining three points of contact or warning that operators should not use the front bulkhead steps to climb into and out of the Trailer. As Grow explained, while he could anticipate that a purchaser might install a tarp and tarp cap, he would "also anticipate that the people putting it on know what they're doing." (SupC79.) When East puts a tarp cap on the front end of a trailer, it always installs a grab handle. (C2412, C2434.) Although Shur-Co supplies a warning label with its tarp kit cautioning users not to walk or stand on the tarp cap (SupC114), Ken's Truck did not affix this label to the Trailer when it installed the tarp cap (SupC173).

As the trial court held, when a product "is safe as manufactured but later modified into an unsafe product by a third party, the incentive to ensure product safety lies with the party requesting a potentially unsafe feature and the party modifying the product to add that feature." (A25/SupR245.) The appellate court's holding to the contrary should be reversed.

III. The trial court properly granted summary judgment with respect to plaintiffs' failure to warn claims.

Finally, the appellate court found the evidence sufficient to raise a question of fact as to plaintiffs' claim that East breached a duty "to warn that a grab handle was necessary if a consumer installed a tarp cover." (A18/¶61.)

"It is well recognized that a failure to warn of a product's dangerous propensities may serve as the basis for holding a manufacturer or seller strictly liable in tort." *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 29 (1980). "[W]hen a design defect is present at the time of sale, the manufacturer has a duty to take reasonable steps to warn at least the purchaser of the risk as soon as the manufacturer learns or should have learned of the risk created by its fault." *Jablonski*, 2011 IL 110096, at ¶111. A manufacturer "has a duty to adequately warn and instruct the user about the dangers of its products of which it knew, or in the exercise of ordinary care, should have known, *at the time the product left its control*." *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶68 (emphasis added). "[I]f the product was not defective at the time of sale," however, the manufacturer has no duty to warn." *Jablonski.*, 2011 IL 110096 at ¶116.

Relying on *Collins v. Sunnyside Corp.*, 146 Ill. App. 3d 78, 80–81 (1st Dist. 1986), the appellate court held that "the determination of whether a product was in an unreasonably dangerous or defective condition because of the failure to give adequate warnings is ordinarily a question for the jury." (A18/¶63.) But the appellate court appears to have misunderstood the import of this language in *Collins*, a case which addressed the adequacy of warnings given to consumers. Whether a warning is adequate is indeed a question of fact for a jury to decide. *Palmer v. Avco Distributing Corp.*, 82 Ill. 2d 211, 221 (1980).

The present case, however, does not involve the adequacy of warnings. Rather, the issue here is whether East had a duty to warn users regarding potential dangers that could be created by the installation of a tarp system. "The determination of whether a duty to warn exists is a question of law." *Sollami*, 201 Ill.

2d at 7. In holding that a question of fact defeated summary judgment with respect to the failure-to-warn claim, the appellate court incorrectly applied the law.

Plaintiffs' failure to warn claim is limited to East's "failure to provide any instructions, directions or warnings to purchasers that grab handles were needed if a tarp cap was installed." (C2064.) This framing of the issue concedes its fatal flaw: the allegedly dangerous condition resulting from the post-sale installation of the tarp cap is a danger that was not present at the time of sale. "[I]f the product was not defective at the time of sale," a manufacturer has no duty to warn. *Jablonski*., 2011 IL 110096 at ¶116.

To prevail on a failure-to-warn claim, plaintiffs must "plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury." *Woodill*, 79 Ill. 2d at 35. East did not know and could not have known that Ken's Truck would install a tarp and tarp cap, much less that it would install the particular Shur-Co tarp system and tarp cap it chose. Shur-Co itself manufactures over 100 different tarp configurations. Imposing a duty to warn here would have required East to devise a warning that addressed every conceivable tarp configuration a customer might chose.

In fact, the warning plaintiffs claimed should have been given here—that "grab handles were needed if a tarp cap was installed"—would not have been appropriate for the tarp and cap configuration installed on the Trailer. Grab handles could not have been installed on top of the Shur-Co tarp cap because the tarp cap was not heavy enough to support grab handles. (SupC181.) Grab handles installed on the face of the trailer would have been too close to the top step, requiring a user to bend down awkwardly to grab it. (SupC181.) Most importantly, the Shur-Co tarp cap

installed on the Trailer was not designed to be climbed or stood upon. (SupC112.) Installing grab handles on top of the tarp cap or on the face of the bulkhead would have encouraged users to climb over the tarp cap, contrary to the warnings supplied by Shur-Co.

Finally, "[n]o duty to warn arises where the risk of harm is apparent to the foreseeable user, regardless of any superior knowledge on the part of the manufacturer." *Sollami*, 201 Ill. 2d at 11. To the extent the Trailer was made more dangerous by the absence of grab handles or by the failure to warn of the necessity of grab handles, Gillespie testified that he repeatedly requested that grab handles be added to the Trailer. (C1768, C1783.) As the risk of injury presented by the absence of grab handles was apparent, no duty to warn arose.

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, East Manufacturing Company, respectfully requests that this Court reverse the judgment of the appellate court and affirm the judgment of the circuit court.

Respectfully submitted,

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Dated: June 9, 2020

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14,854 words.

Kimberly A. Jansen

CERTIFICATE OF SERVICE

I, Kimberly A. Jansen one of the attorneys for defendant-appellee, certify that I electronically filed the foregoing **Appellant's Additional Brief and Appendix** with the Clerk of the Illinois Supreme Court, on June 9, 2020, via Odyssey eFileIL.

I further certify that on June 9, 2020, an electronic copy of the foregoing **Appellant's Additional Brief and Appendix** is being served on the following counsel of record via Odyssey eFileIL:

Michael W. Rathsack
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Under penalties as provided by law pursuant to §1–109 of the Code of Civil Procedure (735 ILCS 5/1–109), I certify that the statements set forth in this instrument are true and correct.

Kimberly A. Jansen

APPENDIX

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2019 IL App (1st) 172549

No. 1-17-2549

Third Division
August 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DALE GILLESPIE and CHRISTINE GILLESPIE, Plaintiff-Appellants, v. ROBERT EDMIER, THOMAS EDMIER, TRAIL QUEST, INC., and EAST MANUFACTURING CORPORATION, Defendants (East Manufacturing Corporation, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 13 L 8261 Honorable John H. Ehrlich, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court, with opinion.
Justices Howse and Ellis concurred in the judgment and opinion.

OPINION

¶ 1 Dale and Christine Gillespie appeal the trial court's grant of summary judgment in favor of defendant East Manufacturing Corporation (East Manufacturing). The Gillespies' action against Robert Edmier, Thomas Edmier, Trail Quest, Inc. (Trail Quest), and East Manufacturing alleged that they were strictly liable for Dale Gillespie's injury and that East Manufacturing's negligence caused Dale Gillespie's injury. East Manufacturing sought and was granted summary judgment. For the following reasons, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 The Gillespies' third amended complaint contains four counts against the Edmiers and Trail Quest and another four counts against East Manufacturing. The Gillespies alleged that the Edmiers and Trail Quest are strictly liable for, and acted negligently in, failing to provide safe access, in the form of additional safety measures, to and from the dump trailer on which he was injured. The Gillespies further alleged that East Manufacturing is strictly liable for, and acted negligently in, designing, manufacturing, and selling a defective and unreasonably dangerous product that lacked adequate safety features, failed to warn or instruct consumers about foreseeable dangers from unsafe modifications, and did not undergo product testing for safety. The remaining counts include claims for loss of consortium in relation to the previous counts. The relevant facts from the pleadings and depositions are as follows.

¶ 4 A. The Dump Trailer Contract

¶ 5 East Manufacturing has been in the business of selling dump trailers for over 40 years averaging sales of 1200 dump trailers each year. The trailer industry is composed of approximately 50 competing companies. The dump trailer at issue is the Genesis II frameless model,[1] which features four cast iron steps on the trailer's front side leading to the top of the trailer in line with the industry standard. The dump trailer also has back side steps. Purchasers have the option of equipping the trailer with a ladder instead of the cast iron steps or a grab handle that would be placed at the top of the trailer. The aluminum rung style ladder would be welded on to the front of the trailer.

¶ 6 Trail Quest is a leasing company dealing in tractors and trailers that has contracts with Barge Terminal Trucking (Barge Terminal). Barge Terminal is a company that transports

[1]References to the dump trailer throughout will be to the Genesis II frameless model unless otherwise specified.

landscaping materials and other products in bulk. Both companies are family-owned and operated by Robert, Thomas, and John Edmier.

¶ 7 Robert, acting as the president of Trail Quest, negotiated an order for a dump trailer from Jim Rohr of Ken's Truck Repair. Robert and Rohr discussed the desired features for the trailer, including installation of a tarp that would cover the top of the trailer. Ken's Truck Repair prepared and sent a "specification sheet" to Robert reflecting the agreed upon features of the trailer. Ken's Truck Repair ordered the dump trailer from East Manufacturing and a tarp cover featuring an aluminum cap from another vendor. Ken's Truck Repair installed the tarp cover and the aluminum tarp cap on the dump trailer and delivered it to Trail Quest, which in turn leased the dump trailer to Barge Terminal.

¶ 8 B. The Accident

¶ 9 Gillespie had worked for Barge Terminal since 1998 as a truck driver. On February 14, 2012, he was working on the dump trailer leased from Trail Quest. He recalled that the weather was unseasonably warm. The dump trailer had been loaded with mulch for a delivery. Using the front side steps, Gillespie climbed on top of the dump trailer and lowered himself into the trailer in order to rake and level the mulch. On his way up, he noticed that the steps were not dry and that the top surface of the trailer was wet.

¶ 10 After leveling the mulch, he turned to climb down the trailer using the steps. Gillespie crawled to the front of the trailer, positioned his right knee on the aluminum cap, placed his left foot down on the first cast iron step, and attempted to place his right foot on the second step. At this point, his hands slipped off the top of the trailer, and his left foot slipped, causing him to fall off the cast iron stairs. He landed on his feet and felt a sharp pain in his back. He immediately reported his injury to his supervisor, Thomas Edmier, before returning to work. With the assistance of a coworker, Gillespie placed a tarp over the trailer and drove

to Plainfield, Illinois. After they completed unloading the mulch, they returned the trailer to Barge Terminal's office in Ottawa, Illinois. Gillespie preloaded the mulch for the next morning's delivery. He testified that he used the dump trailer's stairs once more with no issues before placing a tarp on the trailer and leaving for the day. However, he did not return to work the next day or any day thereafter and instead initiated the present lawsuit.

¶ 11 Robert Edmier testified that Barge Terminal teaches its truck drivers to maintain three-point contact when climbing in and out of trailers as a safety rule. However, he acknowledged that a truck driver has nothing to hold on to when climbing down the steps besides the tarp or the corner of the dump trailer. He further admitted that if a driver holds on to the tarp while climbing down the steps, that driver would not be compliant with the three-point contact safety rule. Robert believed that installing a grab handle at the top of the dump trailer to offer another point of contact when climbing the steps would cost around $100.

¶ 12 C. Plaintiff's Expert Deposition Testimony

¶ 13 Gary Hutter, the Gillespies' expert witness, opined that the steps on the dump trailer did not comply with the recommended practices of the Occupational Safety and Health Administration (OSHA), the American National Standards Institute (ANSI), the Federal Motor Carrier Safety Regulations (FMCSR), and the Truck Trailer Manufacturers Association (TTMA). Although Hutter acknowledged that OSHA had not issued a final rule regarding ladders on motor vehicles such as dump trailers, Hutter believed that OSHA standards were applicable to East Manufacturing's duty of providing a safe access way to the dump trailer. He also believed that it was foreseeable that workers would have to climb on top of the dump trailer. Hutter opined that the cast iron steps on the trailer had no platform and were not the proper width. He further opined that the steps did not have the proper distance, did not have side rails, and the spacing between the steps was too large.

Additionally, he noted that a truck driver had no convenient place to hold when climbing up and down the steps. Hutter testified that he was aware of East Manufacturing installing full ladders on their waste trailers, and that a full ladder could be installed on the front of their dump trailers.

¶ 14 D. East Manufacturing Deposition Testimony

¶ 15 Ed Coffman, the principal design engineer for East Manufacturing, testified that the purpose of the steps on the dump trailer was for drivers to climb up and down the trailer "to inspect the load." He believed it was foreseeable that a driver might use the steps to climb into the dump trailer. He further testified that he was aware that the dump trailers are built to Federal Motor Vehicle Safety Standards, which applies to brakes and lights but he was not aware of any safety standards for ladders. He noted that East Manufacturing was a member of the TTMA. He was not aware of ANSI or OSHA applying to steps or ladders of dump trailers. He did not believe there were any manuals that involved the Genesis II dump trailer. He further testified that he had never seen any of East Manufacturing's dump trailers with a grab handle. He described that East Manufacturing refers to the "bulkhead ladder" as steps and stated that Trail Quest requested a "bulkhead ladder" and did not request a rung style ladder. He stated he did not know how much the rung style ladders cost.

¶ 16 He further testified that East Manufacturing did not have a testing department for the quality of the trailers. He acknowledged that prior to the manufacturing of the trailer at issue that there was an engineering change. The change no longer allowed for a final step any closer than 19 inches to the top of the trailer. He noted that the change was made because "[t]he tarp mechanisms that [East Manufacturing] used, sometimes the tarp overlaps 18 inches down the side, so if [East Manufacturing puts] a step, obviously it's up under the tarp, and then this was to keep it down out of the way. Specifically, on the front, a fabric nose of

cap on a tarp comes down over the front of the trailer approximately 18 inches. So if you have a step there, you can't fasten the tarp."

¶ 17 He testified that the tarp installed on the dump trailer at issue modified the design of the frameless trailer. Because of the location of the tarp the dump trailer lost its three points of contact. Ultimately, the aluminum cap that is placed on the front of the trailer to help seal the tarp removes any means of being able to grab the top edge of the bulkhead. He testified that he had seen that style of aluminum cap installed on East Manufacturing's other trailers prior to the installation of the cap on the subject trailer. East Manufacturing did not provide any information in terms of representations or other documentation to the customer or dealer identifying that if such a tarp were installed, that there would be a change to the body of the trailer.

¶ 18 Charlie Wells, East Manufacturing's vice president of sales and marketing, testified that it is foreseeable that customers may place tarps on a dump trailer after East Manufacturing sells it. Wells further testified that there are different manufacturers of tarps with different configurations so that some tarps have no end caps on the front of the trailer and some end caps vary in shape and form. He was aware of six different manufacturers of tarps.

¶ 19 Andy Grow, one of East Manufacturing's engineers, testified that cast iron steps placed on Genesis II dump trailers had a standard design. He stated that there is no regulation for cast iron steps on dump trailers. He further testified that he has never reviewed the design of the steps or tested the design of the steps to make sure the steps were safe for use. He testified that East Manufacturing has no formal accident review procedure or an investigation procedure, and he was not aware of anyone that has fallen off the steps of East Manufacturing's dump trailers. He stated that East Manufacturing could not speculate on all the different tarp configurations and everything that could happen.

¶ 20 E. The Trial Court's Ruling

¶ 21 East Manufacturing moved for summary judgment. First, it argued that it was not strictly liable for Dale Gillespie's fall because the dump trailer had no design defect. At the time the trailer left East Manufacturing, there was a rounded edge at the steps that was made for someone to grab when climbing in and out the of trailer. It asserted that the addition of the tarp after it was sold to Trail Quest changed the design of the trailer by removing the top part of the steps that was designed to be used as a grab handle. Second, it argued that it was not negligent because it specifically followed the contract that Ken's Truck Repair ordered from its facilities and its duties cannot extend beyond those in its contract.

¶ 22 In response, the Gillespies argued that East Manufacturing was strictly liable because the cast iron steps were defectively designed as they were too far apart, too narrow, the top clearance was inadequate, and the steps offered nothing to grab on to once an individual reaches the top of the stairs, thus making it difficult and dangerous to transition between steps. The Gillespies proffered evidence that the steps did not conform to design standards and criteria set forth by OHSA, FMCSR, ANSI, and TTMA. The Gillespies further posited that they had presented evidence of a feasible alternative design of a ladder that East Manufacturer had installed on other trailer models. Additionally, the Gillespies argued that the addition of a tarp was a foreseeable modification to the trailer. Next, they contended that East Manufacturing failed to provide instructions, directions, or warnings to purchasers that grab handles were needed if a tarp was installed onto the dump trailer. Lastly, they argued under a negligence theory that East Manufacturing had a nondelegable duty to provide a safe product for all intended users.[2]

[2]On appeal, the Gillespies did not challenge the trial court's granting of summary judgment in favor of East Manufacturing on the negligence counts.

¶ 23 The circuit court granted East Manufacturing's motion for summary judgment rejecting the Gillespies' contention that it could have or should have added other safety features based on OSHA requirements or trade group standards. The court ruled that OSHA does not apply to trailers and that industry standards are not mandatory. The court also found that East Manufacturing's trailer met the industry custom and practice because East Manufacturing built the trailer pursuant to the specifications of the purchaser and that the purchaser had the trailer modified by a third party who added the tarp cover and cap. The court further found that the third-party modifications demonstrated that the trailer was not unreasonably dangerous when it left East Manufacturing's control. This appeal followed. Additional pertinent facts will be discussed in the context of the issues raised on appeal.

¶ 24 II. ANALYSIS

¶ 25 On appeal, the Gillespies recite a litany of contentions including (1) the tarp cover modifications did not affect the design deficiencies in the trailer steps, (2) a jury could find that a condition other than the aluminum tarp cap contributed to cause Dale Gillespie's fall, (3) East Manufacturing had a readily available safer alternative, (4) the trailer was not custom designed because East Manufacturing selected the steps on the trailer, (5) the postsale modifications to the trailer were foreseeable, (6) the Gillespies established that East Manufacturing owed them a duty under both the consumer-expectation test and the risk-utility test for product liability, and (7) East Manufacturing failed to warn the purchaser that placing a tarp cover over the trailer would render the trailer unreasonably dangerous.

¶ 26 We can summarize the Gillespie's contentions into three main arguments. First, under the theory of strict liability, the steps of the dump trailer were defective and unreasonably dangerous. Second, it was reasonably foreseeable that purchasers of the dump trailer would place tarps over the top of the trailer and therefore East Manufacturing should have installed

a grab handle on the trailer to prevent injury when using the defective and unreasonably dangerous steps. Lastly, East Manufacturing failed to warn of the dangers of placing a tarp over the top of the dump trailer. In light of these claims, the Gillespies argue that the trial court erred when it granted summary judgment because whether the dump trailer was defective and unreasonably dangerous were issues of material fact that precluded summary judgment.

¶ 27 Summary judgment is proper only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). When determining whether a genuine issue of material fact exists, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). We review the circuit court's entry of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 28 A. Judicial Admissions

¶ 29 Here on appeal, East Manufacturing argues that a judicial admission made by the Gillespies in response to its amended motion to dismiss, standing alone, entitles it to summary judgment. Noting that the trial court made no mention of the alleged admission as the basis for its grant of summary judgment, East Manufacturing entreats this court to affirm summary judgment on the basis of the Gillespies' alleged judicial admission. We decline.

¶ 30 In support of its argument, East Manufacturing recites the following, which it characterizes as the Gillespies' judicial admission:

> "[T]o be clear, plaintiff's negligence counts against East, just like the strict tort counts, pertain to the defective and dangerous condition of the trailer at the time it

> left East Manufacturing. All of plaintiff's charging allegations in paragraphs 6 to 9 of both the strict tort counts and negligence counts, respectively, pertain to the conditions and defects of the trailer at the time it was sold by East. (*e.g.* failure to have a rung ladder, failure to provide warnings, failure to have grab handles, failure to have adequate steps, etc.; these are all conditions that existed when the trailer was sold by East.)."

East Manufacturing argues that the above quoted language limited the Gillespies' allegations against it as to the condition of the trailer at the time it left East Manufacturing. It maintains that "because of this judicial admission, the trailer with its grab bar and steps at the front are safe."

¶ 31 Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998). The subject statement must not be an inference or unclear summary. *Serrano v. Rotman*, 406 Ill. App. 3d 900, 907 (2011). What constitutes a judicial admission must be decided under the circumstances in each case. *Id.* In addition, before a statement can be held to be an admission, it must be given a meaning consistent with the context in which it is found, and it must be considered in relation to the other testimony and evidence presented. *Id.*

¶ 32 In order to determine whether East Manufacturing's argument has merit, we must first consider the alleged judicial admission in its proper context. For that purpose, we sought review, not only of the Gillespies' response to East Manufacturing's motion to dismiss, but also the motion itself. Despite our best efforts, we have been unable to locate East Manufacturing's motion to dismiss in the record. We have, however, reviewed the Gillespies' amended response to the motion, as well as East Manufacturing's amended reply.

Based on our review, it appears that East Manufacturing's motion sought dismissal of the Gillespies' added negligence claim, alleged against East Manufacturing for the first time in its second amended complaint, as time-barred. In response, the Gillespies argued that the negligence count was not time barred and that, in fact, the count related back to the originally filed "strict counts" against East Manufacturing.

¶ 33 Taken in context, the Gillespies' statements in its response to the motion to dismiss related not the condition of the steps at the time it left East Manufacturing but rather the viability of their negligence claim under the relation back doctrine. We express no opinion with respect to whether the added negligence claim in fact relates back. That issue is not before us. We conclude, however, that the statements to which East Manufacturing point fall far short of being a judicial admission.

¶ 34 B. Strict Liability: Design Defect

¶ 35 The Gillespies first argue that the dump trailer had design defects such as a lack of a grab handle on the top of the trailer, a lack of a rung style ladder, and inadequate steps in the front of the trailer. East Manufacturing responds that Dale Gillespie's conduct of crawling across the tarp cap to climb down the front side steps of the dump trailer instead of using the back steps should be considered misuse.

¶ 36 To establish a design defect claim for strict products liability, a plaintiff must prove (1) the product had an unreasonably dangerous condition, (2) the dangerous condition existed when the product left the manufacturer's control, and (3) the condition injured the plaintiff. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 525 (2008). We note that with respect to the third factor, East Manufacturing does not contest that Dale Gillespie was injured. As such, we address the remaining two factors of the Gillespies' design defect claim.

¶ 37 1. Unreasonably Dangerous Condition

¶ 38 The Gillespies contend that East Manufacturing's cast iron steps installed on the dump trailer were defective and unreasonably dangerous under both the risk-utility and consumer-expectation test.

¶ 39 The determination of whether a product is defective and unreasonably dangerous is ordinarily a question a fact for the jury to consider. *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill. 2d 335, 344 (1994). When a plaintiff's claim is based on an alleged design defect, the "unreasonably dangerous" element can be proven under the risk-utility test or the consumer-expectation test (*Mikolajczyk*, 231 Ill. 2d at 526-27), the requirements of each which we define more particularly in our analysis going forward.

¶ 40 a. Risk-Utility Test

¶ 41 The Gillespies argue that they proffered evidence of alternative designs that would have prevented injury and were feasible in terms of cost, practicality, and technological feasibility that demonstrates that East Manufacturing's trailer was unreasonably dangerous due to a design defect.

¶ 42 Under the risk-utility test, we must determine whether, "on balance[,] the benefits of the challenged design outweigh the risk of danger inherent in such designs." (Internal quotation marks omitted.) *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 92-93 (2005). Although the risk-utility analysis is ultimately a question of fact, courts must determine as a preliminary matter whether the case is appropriate to submit to a jury. See *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 263-66 (2007) (setting forth a nonexhaustive list of factors for the court to consider in a risk-utility analysis). In making this determination, courts may consider (1) the product's utility to the public, (2) the likelihood and the probability of foreseeable injury to the consumer, (3) the manufacturer's ability to eliminate unsafe characteristics without impairing its usefulness or making it too expensive to maintain its

utility, (4) availability and feasibility of alternate designs, and (5) conformity with any applicable industry standards and governmental regulations. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 85. In this case, only three of these factors are contested: (1) the dump trailer's conformity with government regulations, (2) conformity with the applicable industry standards, and (3) the availability and feasibility of alternate designs. We focus our analysis on these three.

¶ 43 The Gillespies assert that the trial court erred in granting summary judgment because their expert explained that steps of the dump trailer did not comply with the recommended practices under OSHA, ANSI, FMCSR, and TTMA. East Manufacturing argues that evidence of compliance with OSHA regulations is inapplicable in a product liability action against a manufacturer. East Manufacturing relies heavily on a decision rendered by the Sixth Circuit Court of Appeals, *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26 (6th Cir. 1985), to support its contention. In *Minchello*, the court prohibited the use of evidence of compliance with OSHA regulations in a product liability action. *Id.* at 29.

¶ 44 This court is not bound by federal appellate or district court decisions. *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979, 986 (1993). We find instructive our supreme court decision in *Rucker v. Norfolk & Western Ry. Co.*, 77 Ill. 2d 434 (1979). In *Rucker*, the court held that evidence of a product's compliance with government safety standards is relevant and admissible in a product liability case to determine whether the product is defective and whether a defect in the product is reasonable. *Id.* at 439; see also *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299 (1982) (applying the rule established in *Rucker*). In light of *Rucker*, we find that OSHA is a relevant standard in this case.

¶ 45 Hutter's testimony that the steps' spacing, width, distance, and lack of side rails conflict with the OSHA protocol is intended to support his expert opinion that East Manufacturing

designed steps that were defective and unreasonably dangerous. His testimony provides sufficient evidence that a fact finder could consider when determining whether the steps were unreasonably dangerous. Having determined that OSHA is a relevant standard for the jury to consider, we further find that ANSI, FMCSR, and TTMA standards are also relevant for the jury's consideration. See also *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 298 (2002) (allowing OSHA, ANSI, and other standards and regulations to be admitted into evidence at trial even though the regulations are not binding on the defendant).

¶ 46 With respect to the second factor, we note that East Manufacturing complied with industry standards. Coffman testified that cast iron steps on dump trailers are standard in the industry and has been the standard since he first joined the trailer industry in 1972.

¶ 47 Even so, we find persuasive the Gillespies' contention that safer alternatives to the cast iron steps existed. Hutter's testimony indicates that a ladder was available for other models and was also available upon request for the dump trailer. Thus, it was a reasonable alternative to the standard cast iron stairs. Hutter's testimony was corroborated by Coffman and Wells who also testified that East Manufacturing did in fact offer a ladder option, but that it was not the standard.

¶ 48 On balance, the risk-utility test weighs in favor of the Gillespies. When viewed in a light most favorable to the Gillespies, the deposition testimony of Dale Gillespie, Wells, Grow, Coffman, and Hutter is sufficient to create a genuine issue of material fact as to whether the trailer was unreasonably dangerous.

¶ 49 b. Consumer-Expectation Test

¶ 50 The Gillespies contend that the fact finder could conclude that a truck driver would reasonably expect steps to be constructed with proper spacing and with side rails. East Manufacturing argues that the trailer was built to the safety specifications of the industry.

¶ 51 Under the consumer-expectation test, a plaintiff may prevail if he shows that the product failed to perform as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. *Calles*, 224 Ill. 2d at 256. This standard is objective and based on the average, normal, or ordinary expectations of the reasonable person and thus is not dependent upon the subjective expectation of a particular consumer or user. *Id.* at 254 (citing American Law of Products Liability 3d § 17:24, at 17-44 (rev. 1997)).

¶ 52 Here, the purpose of the cast iron steps on the front end of the dump trailer is to allow drivers to climb in and out of the dump trailer. Coffman, East Manufacturing's design engineer, testified that the steps met the industry standards for dump trailers. However the testimony of another East Manufacturing engineer, Andy Grow, revealed that East Manufacturing never tested the design of the steps to make sure the steps were safe. In addition, East Manufacturing had no formal accident review procedure or an investigation procedure for incidents. The mere fact that East Manufacturing's trailer complied with industry standards, where there are no regulations or guidelines that specifically govern the dump trailer industry, is not persuasive enough to overcome the consumer's expectations.

¶ 53 A reasonable truck driver, like Dale Gillespie, would expect that the steps would be properly spaced. The Gillespies' expert opined that the steps did not have the proper toe distance, did not have side rails, and the spacing between the steps was not proper according to the fixed ladder criteria of OSHA and ANSI. As we discussed in the risk-utility test analysis above, we find that OSHA and ANSI standards are relevant for the purposes of determining whether the cast iron steps were defective and unreasonably dangerous.

Accordingly, genuine issues of material fact remain as to whether the cast iron steps were defective and unreasonably dangerous under the consumer-expectation test.

¶ 54 2. Condition Existed When the Product Left the Manufacturer's Control

¶ 55 Having determined that an issue of material fact exists as to whether the cast iron steps were defective and unreasonably dangerous, we next address the Gillespies' contention that East Manufacturing knew that purchasers would install tarp covers and a tarp cap at the front of the trailer. Specifically, they assert that Trail Quest's need to add a tarp cover and a tarp cap to the dump trailer was reasonably foreseeable and that a truck driver would lose three points of contact once the tarp cover and cap was installed. Given that, they argue that a grab handle should have been installed on the dump trailer before leaving East Manufacturing to give a truck driver the ability to hold on to an apparatus while climbing up and down the front of the dump trailer.

¶ 56 Where an unreasonably dangerous condition is caused by a modification to the product after it leaves the manufacturer's control, the manufacturer is not liable unless the modification was reasonably foreseeable. *Davis v. Pak-Mor Manufacturing Co.*, 284 Ill. App. 3d 214, 220 (1996). "Foreseeability means that which it is objectively reasonable to expect, not merely what might conceivably occur." (Emphasis omitted.) *Winnett v. Winnett*, 57 Ill. 2d 7, 12-13 (1974).

> "If a product is capable of easily being modified by its operator, and if the operator has a known incentive to effect the modification, then it is objectively reasonable for a manufacturer to anticipate the modification. [Citations.] Conversely, if the alteration of the product requires special expertise, or otherwise is not accomplished easily, then it is not objectively reasonable for a defendant to foresee the modification." *Pak-Mor Manufacturing Co.*, 284 Ill. App. 3d at 220.

Questions of foreseeability are usually resolved by the jury, but in certain instances, these questions may be decided as a matter of law where the facts establish that the plaintiff would never be entitled to recovery. *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382, ¶ 8 (citing *DeArmond v. Hoover Ball & Bearing, Uniloy Division,* 86 Ill. App. 3d 1066, 1071 (1980)). Here, the question is properly one for the jury.

¶ 57 Coffman testified that he had seen the same style of aluminum cap installed on East Manufacturing's other trailers prior to the installation of the cap on the subject trailer. This confirmed that East Manufacturing was aware that dump trailers are modified in this manner. Additionally, Wells's and Grow's testimony acknowledged that it was common in the industry for a tarp and tarp caps to be placed upon dump trailers. Although there may be uncertainty as to which style of tarp and tarp caps might be placed on to the dump trailers, there was no dispute that they were often placed on dump trailers similar to East Manufacturing's dump trailer. See *Pak-Mor Manufacturing Co.,* 284 Ill. App. 3d at 221 (noting that the existence of an industry-wide phenomenon factored into whether a genuine issue of material fact existed about the foreseeability of truck operators altering a control switch on garbage trucks).

¶ 58 Further, Coffman testified that once the tarp was installed, the dump trailer lost its three points of contact, which reduced a truck driver's ability to grab the top edge of the front of the trailer. Given Coffman's testimony, it follows that Dale Gillespie may have struggled maintaining three points of contact after placing the tarp on top of the front of the trailer.

¶ 59 In construing all reasonable inferences from Coffman, Grow, and Wells' deposition testimony in the light most favorable to the Gillespies, we find that a genuine issue of material fact remains as to whether it was foreseeable that purchasers would install tarp covers and caps and whether the presence of a grab handle would be necessary to maintain

three points of contact. Therefore, we find that summary judgment should not have been granted.

¶ 60 C. Strict Liability: Failure to Warn

¶ 61 The Gillespies further contend that East Manufacturing failed to warn that a grab handle was necessary if a consumer installed a tarp cover. They argue that the lack of a grab handle rendered the trailer unreasonably dangerous and thus East Manufacturing is strictly liable for its failure to warn of that danger.

¶ 62 Under a failure to warn theory, a plaintiff must show that the manufacturer did not disclose an unreasonably dangerous condition or instruct on the proper use of the product as to which the average consumer would not be aware. *Sollami v. Eaton*, 201 Ill. 2d 1, 7 (2002). "A manufacturer has a duty to warn where the product possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm, and the manufacturer, possessed of such knowledge, knows or should know that harm may occur absent a warning." *Id.*

¶ 63 However, there is no duty to warn where the product is not defectively designed or manufactured and where the possibility of injury results from a common propensity of the product that is obvious to the user. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 467 (1976) (citing Restatement (Second) of Torts § 402A cmt. j, at 353 (1965) (noting that a product may be prevented from being considered unreasonably dangerous if it is accompanied by directions or warnings about its proper use; a product that bears an adequate warning "is not in [a] defective condition, nor is it unreasonably dangerous")). The determination of whether a product was in an unreasonably dangerous or defective condition because of the failure to give adequate warnings is ordinarily a question for the jury. *Collins v. Sunnyside Corp.*, 146 Ill. App. 3d 78, 80-81 (1986) (citing *Ebbert v. Vulcan Iron Works, Inc.*, 87 Ill. App. 3d 74, 76 (1980)).

¶ 64 Here, as discussed above, East Manufacturing was aware of the practice of maintaining three-point contact in the truck driving industry when working on a trailer. East Manufacturing acknowledged that by placing a tarp over the front top of the dump trailer, the consumer would not be able to maintain the three-point contact necessary for the consumer's safety. As East Manufacturing was well aware that this problem could occur but did not warn of the potential danger to consumers, we find that summary judgment was improperly granted.

¶ 65 Finally, East Manufacturing claims that this court should affirm summary judgment because Dale Gillespie's conduct in crawling across the tarp cap to climb down the front side steps of the dump trailer instead of using the back steps constitutes misuse. Misuse of a product occurs when it is used for a purpose neither intended nor reasonably foreseeable by the defendant based on an objective standard. *Arellano v. SGL Abrasives*, 246 Ill. App. 3d 1002, 1010 (1993). In the present case, Coffman testified that the purpose of the steps on the dump trailer was for drivers in climbing up and down the trailer "to inspect the load." He further stated that it was foreseeable that a driver might use the steps to climb the dump trailer. Coffman's testimony indicates that Dale Gillespie used the stairs for its intended purpose and that it was reasonably foreseeable for him to climb down the front stairs. Therefore, we reject East Manufacturing's contention of misuse as a basis for affirming summary judgment.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we reverse the trial court's grant of East Manufacturing's motion for summary judgment as to the strict liability count and remand for further proceedings.

¶ 68 Reversed and remanded.

No. 1-17-2549

Cite as:	*Gillespie v. Edmier*, 2019 IL App (1st) 172549
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 13-L-8261; the Hon. John H. Ehrlich, Judge, presiding.
Attorneys for Appellant:	Michael W. Rathsack, Nicholas J. Faklis, and Michael C. Mead, of Chicago, for appellants.
Attorneys for Appellee:	Thomas E. Sarikas, of Bryce Downey & Lenkov LLC, of Chicago, for appellee.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Dale Gillespie and Christine Gillespie, Plaintiffs, v. Robert Edmier, Thomas Edmier, Trail Quest, Inc., and East Manufacturing Corporation, Defendants,	)	No. 13 L 8261
East Manufacturing Corporation, Third-Party Plaintiff, v. Barge Terminal Trucking, Inc. and Kent's Truck Repair, Inc., Third-Party Defendants.	)	

ILLINOIS SUPREME COURT RULE 323(c) CERTIFIED REPORT OF PROCEEDINGS

This court certifies pursuant to Illinois Supreme Court Rule 323(c) that this document accurately reports the October 3, 2017 proceedings before this court. Neither party had provided a court reporter to transcribe those proceedings. This report is a compilation of the proposed reports submitted by the parties as well as this court's extensive notes (retained on the court's laptop computer) that were read in open court. The court presented its ruling based on the parties' written submission and without oral argument.

The court began by identifying the various parties and the particular claims against each. The court noted the inconsistency in the numbering of claims and the parties' reference to them based on differences between the second- and third-amended complaints. The court then provided a detailed recitation of the facts of the case as well as the claims against each defendant.

The court next explained the chain of events from East Manufacturing's construction of the dump trailer to Dale Gillespie's injury. The court indicated that the events began with the Edmiers desire to purchase a dump trailer for use in their businesses. They retained Ken's Truck Repair to act as a broker between the Edmiers and East. On the Edmiers' behalf, Ken's supplied East with a list of the Edmiers' specifications or features for the dump trailer that did not include a catwalk or a ladder. East sent a production-build letter to Ken's restating the specifications and features and asking for Ken's confirmation. Ken's confirmed the letter. East then manufactured the dump trailer and delivered it to Ken's. Ken's later modified the dump trailer by, among other things, adding an aluminum tarp and a tarp cap that covered the dump opening and the bulkhead at the head of the trailer. Ken's then delivered the modified dump trailer to the Edmiers. On the day of Gillespie's injury, he attempted to climb down from the top of the dump trailer and slipped. Since the tarp and tarp cap covered the bulkhead, Gillespie did not have anything to grab onto to prevent him from falling. Gillespie then fell from the dump trailer and was injured.

The court recognized that East's central argument is that the dump trailer had not been modified when it left East's possession. Instead, at that time, the dump trailer had an exposed bulkhead with a rounded edge that a person could grab onto at the top of the trailer's front end. The court cited to the deposition transcript of East's product engineering manager, Ed Coffman, who testified that the type of tarp and tarp cap installed after the dump trailer had left East's possession changed the dump trailer's design by effectively removing the top part of the

bulkhead that a person could grab onto in order to get off the dump trailer.

The court began its legal analysis by noting that *Suvada v. White Motor Co.*, 32 Ill. 2d 612 (1965), adopted into Illinois law the doctrine of strict liability as presented in section 402A of the Restatement (Second) of Torts. The court read the relevant provisions of the section. The court then indicated that the section's purpose is to impose liability for a loss caused by a defective product on those who created the risk and reaped the profits by placing it into the stream of commerce, regardless of any negligence on the part of the manufacturer. Citing *Liberty Mut. Ins. Co. v. Williams Machine & Tool Co.*, 62 Ill. 2d 77 (1975), and *Bittler v. Doyen & Assocs.*, 271 Ill. App. 3d 645 (1st Dist. 1995).

The court then indicated the elements of a products liability case that a plaintiff must establish. Citing *Suvada*. The court recognized that a plaintiff is not required to present expert testimony that the alleged defective product contained a specific defect. Citing *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill. 2d 570 (1976). The court quoted the standard that: "A *prima facie* that a product was defective and that the defect existed when it left the manufacturer's control is made by proof that in the absence of abnormal use or reasonable secondary causes the product failed 'to perform in the manner reasonably to be expected in light of [its] nature and intended function.'" The court also cited *Erzrumly v. Dominick's Finer Foods, Inc.*, 50 Ill. App. 3d 359 (*Tweedy* eased plaintiff's burden of proof in strict liability case). The court noted that the *Tweedy* doctrine has been analogized to the *res ipsa loquitur* doctrine in negligence cases. Citing *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.*, 12 Ill. App. 3d 165 (1st Dist. 1973); *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill. App. 3d 370 (1st Dist. 1993).

The court then noted that the law distinguishes between unique products from those purchased off the shelf. To support that principle, the court quoted an extended passage from *Bittler*

v. Doyen & Assocs., 271 Ill. App. 3d 645, 649-50 (1st Dist. 1995). The court indicated that this exception to the general rule comports with the third element of a plaintiff's burden in establishing a strict products case – that the defective condition existed at the time the product left the defendant's control.

The court then reviewed the relevant facts in light of the law. The record indicated that East had been building dump trailers for many years and that this particular dump trailer met industry standards. There was no evidence in the record either that catwalks or ladders are ever features on dump trailers or that Ken's requested that East add such features to this particular dump trailer. Rather, the evidence established that the Edmiers through Ken's explicitly indicated the features they wanted and that East delivered that product.

The court further noted that Gillespie testified that his hands slipped off the aluminum cap over the tarp. Neither the tarp nor the tarp cap was on the dump trailer at the time it left East's manufacture. Rather, at the time the dump trailer left East's manufacture, there existed a bulkhead that Gillespie could have grabbed to prevent himself from falling. Based on the consistent testimony as to the condition of the dump trailer at the time it left East's manufacture and the consistent testimony that the aluminum tarp and tarp cap were added later, the court concluded that the dump trailer was safer when it left East's manufacture than when it left Ken's where it had been modified.

The court next considered Gillespie's argument that other safety features could have or should have been added by East based on OHSA requirements or trade group standards. The court rejected the argument for two reasons. First, OSHA does not apply to dump trailers. Second, industry standards are not mandatory, and there was no evidence in the record indicating that the industry has standards for features used to get on or off a dump trailer. Rather, the only testimony was that: (1) for many years East has been manufacturing the type of dump trailer sold in this case; (2) the dump trailer sold in this case met the

industry's custom and practice; and (3) the Edmiers and Ken's got the kind of dump trailer they had ordered.

The court then distinguished *Bittler*. In this case, the Edmiers and Ken's, not East, were the persons with the most knowledge of how the dump trailer would eventually be used. The court concluded that, as to a custom product that is safe as manufactured but later modified into an unsafe product by a third party, the incentive to ensure product safety lies with the party requesting a potentially unsafe feature and the party modifying the product to add that feature. To shift the incentive to the manufacturer of a safe product would, in this case, deprive East of the benefit of its bargain to contract for the manufacture of what was a safe product.

The court expressed its belief that the plaintiff is comparatively negligent, but that is not an issue for summary judgment. The court then granted East's summary judgment motion and authorized the inclusion of language pursuant to Illinois Supreme Court Rule 304(a). Relatedly, the court denied the summary judgment motions of the Edmiers and Trail Quest and found that the court's ruling mooted the summary judgment motion of third-party defendant Barge Terminal.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

DEC 08 2017

Circuit Court 2075

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January 29, 2020

In re: Dale Gillespie et al., Appellees, v. Robert Edmier et al. (East Manufacturing Corporation, Appellant). Appeal, Appellate Court, First District.
125262

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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