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IN THE SUPREME COURT OF ILLINOIS

MARTIN PRODUCE, INC., Third-Party Plaintiff and Appellee, v. JACK TUCHTEN WHOLESALE PRODUCE, INC., and LA GALERA PRODUCE, INC., Third-Party Defendants and Appellants.	Appeal from the Appellate Court of Illinois, First Judicial District, Fifth Division Appellate Court No. 01-23-1369 Circuit Court of Cook County, Illinois, Court No. 2016-L-6628

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Martin Produce, LLC, ("Martin") raised several arguments in its final attempt to sidestep the pre-suit notice requirement under the UCC including that 1) pre-suit knowledge of the allegedly defective cilantro was provided to La Galera via the personal injury lawsuits filed against it and via written and oral discovery that La Galera participated in; 2) Martin did not need to be the source of any pre-suit knowledge obtained by La Galera to satisfy the actual knowledge exception to UCC notice; 3) public policy mandates that Martin should not be barred from suing La Galera as it is a good faith consumer; and 4) a new exception to the UCC should be created to address this unique factual scenario. All of Martin's argument should be rejected for any of the following reasons.

First, Martin's position conflicts with this Court's ruling in *Connick* which requires actual knowledge of a defect, not simply knowledge of an allegation, let alone an allegation made by a third-party who had no relationship with La Galera. As repeated throughout La Galera's briefs, allegations are akin to notice, not knowledge, and that notice must come directly from Martin to La Galera. That notice must also be provided pre-suit, not during the course of a litigation. This Court did not stretch the actual knowledge exception such that it would allow allegations to morph into proof of actual knowledge that a co-defendant in the same case could use to satisfy the notice requirements of the UCC.

Second, Martin raises for the first time in this case that La Galera somehow achieved actual knowledge of a defect by participating in written and oral discovery before Martin filed its third-party complaint. Martin does not allege this is how La Galera achieved actual knowledge of the defect and never raised the issue in the trial court or appellate

court. Raising the issue here for the first time is unquestionably improper such the argument is waived. Regardless, despite reviewing the discovery materials for this Court, Martin cannot point to one piece of evidence that would apprise La Galera its cilantro was actually contaminated with E.coli before it was sold. Moreover, allowing the actual knowledge exception to be used by party litigant, who sat back and wait for discovery to commence for a year before filing its third-party complaint, would render the UCC notice requirements nearly meaningless.

Third, Martin produce confuses itself with a consumer plaintiff, which it is not. Martin is a merchant plaintiff that suffered no personal injuries in this transaction. This Court has already analyzed what is expected for merchant plaintiffs before it can sue another party for breach of implied warranty under the UCC. If those requirements are not satisfied, the merchant plaintiff is barred from any remedy. There is no dispute in this case that Martin did nothing to provide pre-suit notice to La Galera and the consequence of this inaction is foreclosure of Martin's Third-Party Complaint against La Galera for breach of implied warranty as a matter of law.

Fourth, Martin pretends that it was put in a difficult situation, could not provide La Galera notice pre-suit and begs this Court to create yet another exception. Sending pre-suit notice is not a difficult task and a merchant like Martin could have satisfied its notice requirements with a short letter or phone call when it was being investigated by the Chicago Department of Health as early as July 2016. Martin chose not to for some reason and it must face the consequences of its inaction, not beg for a bail out with the creation of another exception this is not necessary.

ARGUMENT

I. ACTUAL KNOWLEDGE OF THE DEFECT WAS NEVER OBTAINED BY LA GALERA IN THIS CASE WHICH FORECLOSES MARTIN'S CLAIMS AGAINST LA GALERA.

Martin's insistence that the personal injury lawsuit allegations provided La Galera with actual knowledge of the alleged E.coli contamination contradicts the holdings from the Illinois Appellate Court and this Court. (See Response Brief Argument Sections I.A and I.C). Martin argues that the allegations in the personal injury lawsuits provided La Galera with more than just generalized knowledge of the alleged defect in question such that the actual knowledge exception to UCC notice was satisfied. Martin also argues that it is irrelevant as to who provided this information to La Galera and that it could use mere allegations made by third-parties to excuse its notice obligations. Martin's arguments are erroneous and should be rejected as a matter of law.

First, the actual knowledge exception to UCC notice requires *the seller-defendant to have actual knowledge of the defect*, not a mere allegation made by another. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 492 (1996). Likewise, this exception to UCC notice has never been expanded to allow a buyer, like Martin, to prove actual knowledge of a defect by relying on allegations made by someone else. The Appellate Court's ruling on this issue, deeming that the actual knowledge exception can be satisfied based on allegations alone, is erroneous as a matter of law which warrants reversal of that decision for this reason alone.

Martin does not dispute that the exception created by this Court requires knowledge of the defect for the exception to apply. Instead, Martin's argument relies on the same flawed reasoning from the Appellate Court that misapplied the Court's the actual

knowledge exception and all of the Illinois case law decided before *Andrews*. Martin argues that although the personal injury plaintiffs themselves could not rely on their own complaints as proof that La Galera had actual knowledge of the defect, Martin, a co-defendant in the same case, could because those personal injury lawsuits informed all sellers within the distribution chain that the cilantro they sold was alleged to be defective. This argument, however, is wholly illogical because there is no dispute that the allegations do not provide a seller-defendant with actual knowledge of the defect when the complaint is initially filed. See *Connick*, 174 Ill. 2d at 495. Even the *Andrews* court recognized this fact. *Andrews*, 2024 IL App (1st) 231369, P41. Yet, the holding in *Andrews* stands for the proposition that if Martin re-pled the same set of allegations in a third-party complaint, instantaneously La Galera would have actual knowledge of a defect, which is absurd and which this Court should respectfully reject.

Second, Martin suggests that La Galera has no support for its position that allegations are not enough to prove actual knowledge of the defect. Martin points to the fact that direct notice almost always involves mere allegations, as a buyer must simply advise the seller that the product is defective, thereby giving notice of the alleged defect so the seller may investigate, negotiate or cure the defect. (Response, pg. 22). This is one of the only times Martin correctly cites the law on UCC notice in its entire brief (although Martin still left out the requirement that this notice must be timely provided pre-suit). As La Galera argued in its opening brief, allegations are akin to notice and what the buyer believes is wrong with a product. As long as the pre-suit notice is provided in a timely manner, all buyer-plaintiffs can satisfy their direct notice requirement in this fashion,

usually coming in the form of a short letter or brief phone call alleging a breach of implied warranty.

Martin's argument that a buyer would need to physically present the product in its defective state to a seller to satisfy its pre-suit direct notice requirement is, however, wrong. (See Response Brief, pg. 22). Actual knowledge can be satisfied by delivering the product in its defective condition to the seller though, as evident by this Court's holding in *Connick* where it cited to three cases providing guidance on what actual knowledge looks like. *See Malawy v. Richards Manufacturing Co*., 150 Ill. App. 3d 549 (1986*)*; *Crest Container Corp.*, 111 Ill. App. 3d 1068; and *Overland Bond & Investment Corp.*, 9 Ill. App. 3d 348 (1972). These cases where actual knowledge of the defect was found share the fact that the seller-defendant witnessed the defect of the product first-hand before being sued. Those defendants did not simply rely on an allegation from a buyer or other third-party like Martin is trying to do in this case. Martin's attempt to downplay these holdings by arguing that they were decided before *Connick* misses the mark entirely because *Connick* adopted those decisions as primary examples of what is needed to prove actual knowledge of a defect. Martin's attempt at distinguishing *Connick* by arguing that first-hand observation of the defect in this case was not possible because the E.coli contamination is latent also fails. Even if this was true, it would not help Martin's cause here, it would only mean they could not rely on the actual knowledge exception. Martin would simply need to provide direct pre-suit notice to La Galera which it admits it did not do.

Third, Martin argues that it should only need to rely on the allegations made by the personal injury plaintiffs because Martin itself is not making any claim for damages. (Response pg. 21-22). Rather, Martin argues it filed a contingent third-party complaint

seeking to hold La Galera liable only if it is first found liable to Carbon, a separate party who did not even sue La Galera for economic damages. However, this does not excuse Martin from its notice requirements. See *Microsoft Corp. v. Logical Choice Computers, Inc.*, 2000 U.S. Dist. LEXIS 10972 (N.D. Ill. July 21, 2000). Even third-party plaintiffs still need to satisfy their notice requirements which Martin admittedly did not do. This argument should be likewise be rejected.

II. MARTIN WAIVED ANY ARGUMENT LA GALERA OBTAINED ACTUAL KNOWLEDGE OF ANY DEFECT BY DEFENDING ITSELF IN THIS CASE.

Martin argues that La Galera participated in discovery during the case before Martin sued it such that actual knowledge was achieved. However, Martin waived its argument which it raised for the first time in its response brief before this Court. Illinois law does not allow litigants to raise new arguments for the first time on appeal. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 161, (1999) ("Issues raised for the first time on appeal are waived."). These arguments in the response brief were unquestionably waived as a result.

Further, Martin's allegation in the controlling Third-Party Complaint is that La Galera had actual knowledge of the defect because it was sued by the personal injury plaintiffs, not because it participated in discovery during the case. Martin only raised this argument during its response brief on appeal to with this Court. Regardless even with spending six pages citing to discovery materials and/or depositions in its response brief, Martin still could not point to any piece of evidence that would have provided La Galera with actual knowledge that its cilantro was contaminated with E.coli when it was sold to Martin. Likewise, this argument leaves a void in this case because Martin still cannot offer up anyone from La Galera who supposedly gained actual knowledge of the defect or when

they gained that knowledge. Therefore, Martin's argument still fails regardless of the waiver.

III. MARTIN'S INACTION UNDERCUT ALL OF THE STATED PURPOSES FOR THE UCC NOTICE REQUIREMENTS.

Martin's response brief argues, notwithstanding that La Galera never had actual knowledge its cilantro was contaminated with E.coli and a nearly two year delay from the outbreak until it was sued, that the intent and purpose of the UCC notice was fulfilled in this case. Martin fails to acknowledge that its inaction undercut all of the stated purposes behind UCC notice especially La Galera's ability to investigate the claims in or around the time the E.coli outbreak unfolded.

Martin admits that the purpose of UCC notice is to allow the defendant an opportunity to marshal evidence, investigate facts, and negotiate settlement of a claim, if necessary, and mitigate damages. *Connick,* 174 Ill. 2d 482. Yet, Martin chose only to focus on one of these stated purposes of UCC notice, the avoidance of litigation, arguing that Carbon would have sued Martin no matter what La Galera or Jack Tuchten's pre-suit investigation would have revealed such that notice should not be required in this case. Martin's argument should be rejected because the purpose of UCC notice does not guarantee litigation will be avoided between merchants, only that there is a preference to try and avoid that litigation if possible. If timely alerted, La Galera could have performed an investigation and testing of its growing fields, harvesting facilities and employees to prove, for Martin's benefit as well as for La Galera's, without a shadow of a doubt that the cilantro was not contaminated with E.coli when it was sold to Martin. While it is not clear such evidence would have prevented Carbon's complaint against Martin, the attempt to avoid litigation with such evidence would have fulfilled one of the purposes of UCC notice.

La Galera had that opportunity taken away from it though because Martin never notified La Galera of the situation at any time.

Analyzing the remaining purposes behind UCC notice makes Martin's inaction worse. Another stated purpose of UCC notice is to allow the seller to marshal evidence in its defense. While La Galera has strong arguments that its cilantro was never contaminated with E.coli when it was sold to Martin, La Galera was not able to fully investigate the situation as argued above. Furthermore, had any supplier's cilantro actually been contaminated with E.coli, they never would have had any chance to mitigate their damages if only being made aware of the situation nearly two years later. Luckily, there is no evidence that any cilantro sold to Martin was contaminated because Martin sold cilantro all over Chicago, and its suppliers wholesaled cilantro all over the country, but only Carbon had an E.coli outbreak.

These are not mere technicalities as Martin suggests in its response brief. Its inaction, which prejudiced La Galera and undercut these stated purposes, cannot be without consequence. The consequence prescribed by law, is foreclosure of Martin's Third-Party Complaint for breach of implied warranty as a matter of law.

IV. A SPECIAL EXCEPTION FOR MARTIN IS NOT WARRANTED.

Lastly, Martin tries to draw sympathy by incorrectly claiming it will be forced to endure two jury trials if the Appellate Court's decision is overturned. This is erroneous because Martin's claims against La Galera would be foreclosed as a matter of law. It would not have the ability to sue La Galera for a breach of implied warranty under the UCC even if it lost during its trial with Carbon. Regardless, Martin deserves no sympathy from the Court because Martin dug its own hole in this case by not providing pre-suit notice to La

Galera in July 2016 when it was first notified of the alleged E.coli outbreak by the Chicago Department of Public Health. Martin's request for a new exception to bail it out of the situation is not warranted.

CONCLUSION

For all the reasons set forth above, La Galera Produce, Inc., respectfully requests this Honorable Court reverse the Appellate Court's decision and affirm the Trial Court's granting of summary judgment as a matter of law in its favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 9 pages.

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TO: Attorneys of Record (See Attached Proof of Service)

YOU ARE HEREBY NOTIFIED that on this **17TH day of January 2025**, we caused to be electronically filed with the Clerk of the Illinois Supreme Court, **APPELLANT'S REPLY BRIEF** a copy of which is attached hereto and herewith served upon you.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth herein are true and correct and that on January 17, 2025, APPELLANT'S REPLY BRIEF was served on the following counsel of record via electronic mail :

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