No. 125262

In the

Supreme Court of Illinois

DALE GILLESPIE and CHRISTINE GILLESPIE,

Plaintiffs-Appellees,

vs.

EAST MANUFACTURING CORPORATION,

Defendant-Appellant,

and,

ROBERT EDMIER, THOMAS EDMIER, and TRAIL QUEST, INC.,

Defendants.

Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-17-2349.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 13 L 8261.
The Honorable **John H. Ehrlich**, Judge Presiding.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

POINTS AND AUTHORITIES

I. Government regulations and industry standards addressing the dimension and spacing of steps and ladders can serve as a basis for an expert's opinion about whether steps used on a product are unreasonably dangerous.

NATURE OF THE CASE

Dale Gillespie climbed the metal steps on the front of the trailer and crawled over the tarp cap to level the mulch and clear mulch that had been dumped on its bows. While retracing his route, his hands slipped off the top of the trailer and his foot slipped off the top step. He fell, leading to cervical and spinal fusions.

Gillespie[1] sued East Manufacturing, the manufacturer. He alleged the steps were improperly designed, a grab handle or a rung-style ladder should have been added, and a warning to the buyer to add a handle was required.

East moved for summary judgment. As to the steps, it primarily contended its trailer was not dangerous because it met government and industry standards. As to the grab handle, its primary argument was that the need for a handle was created by the buyer's addition of a tarp cover.

Plaintiff's response pointed to expert testimony that the step design was unsafe based, among other things, on industry and government standards setting criteria for step geometry. As to the grab handle, Plaintiff pointed out that East knew buyers added tarp covers, making a grab handle or ladder necessary, and that East had installed handles on other trailers.

In reply, East contended OSHA governed only employer conduct and was not applicable, and that OSHA, ANSI, TTMA, and FMSCA did not apply

[1] Dale's wife filed a loss of consortium count. We will refer to plaintiff in the singular for convenience.

to trailers. It repeated its contention that its trailer met regulations and that its compliance with the regulations insulated it from liability.

The court granted summary judgment. Its primary holding was that East was not responsible because the buyer created the danger by adding the tarp cover.

The appellate court reversed. It acknowledged the standards describing safe step geometry and that Plaintiff's expert relied on them for his opinion that these steps were unreasonably dangerous and that East should have used better steps or a rung-style ladder. It deemed the standards relevant in determining whether the steps were defective. As to the grab handle, the court pointed out that East was aware tarp covers would be added and that this would create a need for both a grab handle and a warning to the purchaser.

Plaintiff's Nature is more detailed than usual because he is responding to East's attempt to reframe the case. For example, East claims the standards do not apply to trailers, but as the appellate court explained, the question is whether the expert can rely on these standards when determining whether the step geometry was defective. East also raises new issues, e.g., feasibility, not challenged below. Finally, all but the standards issue are out of bounds because they were not preserved in the Petition for Leave to Appeal.

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Defendant initially lists two issues, one about using the standards and a second catchall about whether summary judgment was correct, but East Manufacturing's argument addresses eight issues. Plaintiff parses the issues to compare them to Defendant's Points Relied on for Review and to the issues raised below. The preliminary question as to the last seven issues is whether East forfeited them by not including them in its Points Relied on for Review.

A. As to the risk-utility test:

1) East's argument says the first issue is whether the cited government and industry standards apply to trailer manufacturing. Def. br. at 24. That is not correct. The issue is whether experts can rely on such standards when evaluating the safety of step geometry where those standards address a device other than the one at issue.

2) East's argument says the second issue is whether Plaintiff showed a safer rung-style ladder was feasible. Def. br. at 37. The preliminary issue is whether East forfeited this point.

3) East's argument says the third issue is whether summary judgment was proper because it used this style of steps on other trailers without injury. Def. br. at 40. Rather, the issue is whether East's contention that it had not heard of other injuries is dispositive.

4) East's argument says the fourth issue is whether the open and obvious rule mandates summary judgment because Plaintiff was aware of the

danger and could have used the rear steps. Def. br. at 41, 42. The preliminary issue is whether the open and obvious rule applies where the product is not simple.

B. As to the consumer expectation test:

5) East's argument says the fifth issue is whether Plaintiff forfeited the consumer expectation test. Def. br. at 43. The preliminary issue is whether East forfeited this argument.

6) The sixth issue is whether the trailer performed as expected.

C. As to the grab handle claim:

7) East's argument says the seventh issue is whether the purchaser's addition of the tarp cap negated a duty to add a grab handle. Def. br. at 45. Rather, the issue is whether East's knowledge that the purchaser would add a cap necessitating a grab handle created a duty to add that handle in anticipation of the modification.

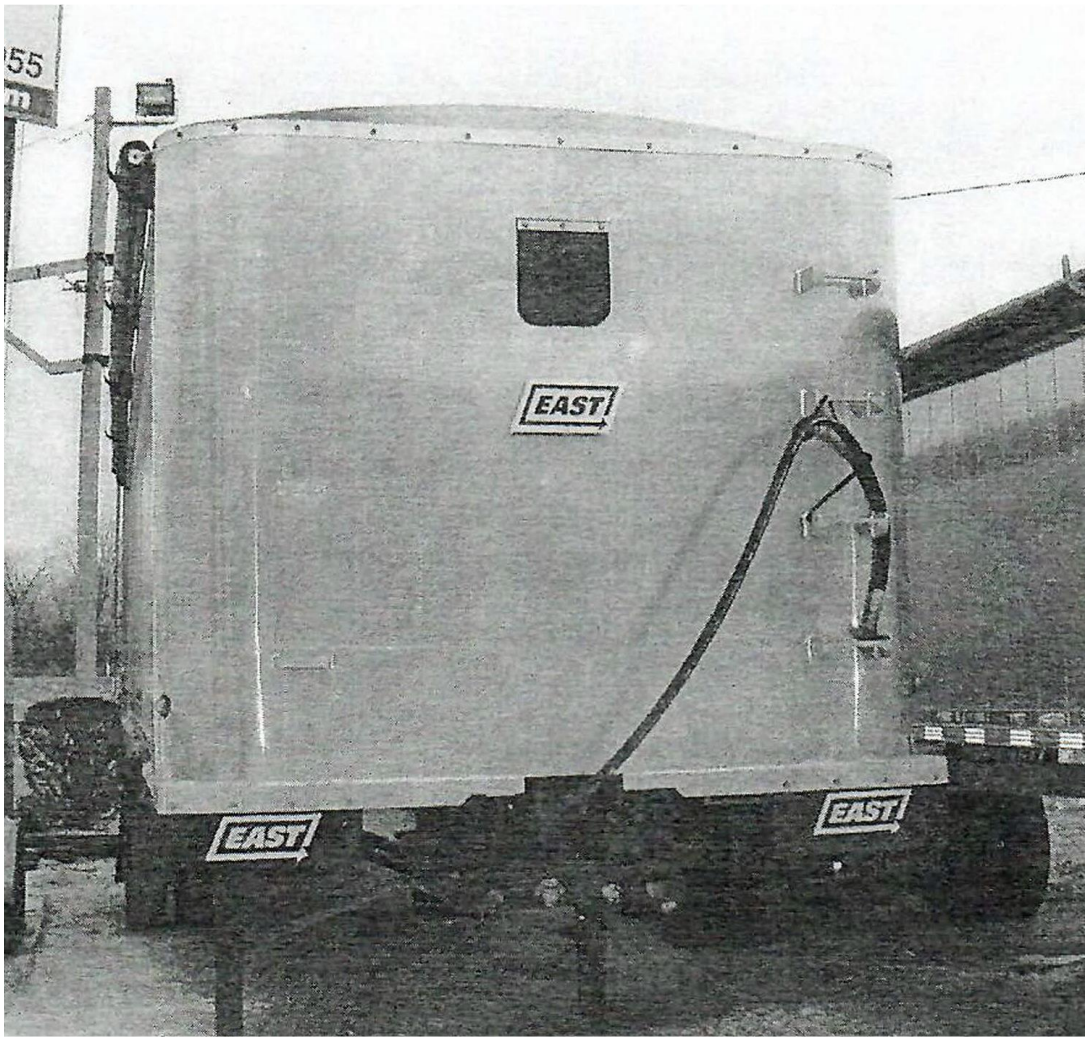
D. As to the failure to warn claim:

(8) The issue is whether the court properly found a duty to warn purchasers to add a handle where East knew the purchaser would add a tarp cover and cap.

STATEMENT OF FACTS

The accident

A worker using a front-end loader filled an East Manufacturing dump trailer to the top with mulch. C1782 (104), C1788 (127). Dale Gillespie, driving truck for Barge Terminal, climbed up the metal steps on the trailer's front to get on top of the load. C1769 (53), C1770 (56). A photo of the front of the trailer with the steps is below. C2846.



The front top edge of the trailer has a tarp cap, a flat piece of metal that is part of the tarp cover. It offers nothing to hold onto. C1782 (103). Gillespie crawled over the cap to get onto the load. C1770 (56). Loads have to be evenly distributed to prevent a risk of turning over. C2425 (39). He leveled the mulch and he also removed mulch left on top of the ribs or bows running crossways to support the tarp, so the cover would slide over them. C1770 (57), C1771 (58), C1782 (104). After leveling the load, he turned to climb down. C1771 (58).

Gillespie got down on his hands and knees and pivoted around so he could crawl onto the cap and lead with his left foot. C1771 (59), C1782 (104). He left his right knee on the plate and brought his left foot down onto the top step. C1771 (59). As he brought his right knee down to get his right foot on the second step, his hands slipped off the top of the trailer and his left foot slipped. C1771 (59-60). His right foot did not make the second step. C1771 (60). He consequently fell ten feet, resulting in cervical and spinal fusions. C1771 (60-61), C175, C320.

He did not use the steps at the rear because of the great distance between the last step and the ground. When he had tried that route earlier, he almost fell. C1782 (104-05), C1783 (107).

Trailer steps

Trail Quest purchased this trailer from East (through Ken's Truck) with steps so users could get inside. C1928 (49). Those steps are standard on this type of trailer. C2325 (37). The top step is about 20 inches below the top edge

of the trailer. C2425 (38). The four steps were 10 1/8 inches wide in their outside dimension. C2557 (v3). However, the inside dimension of each step was just eight and three-quarter inches. C2557. The steps were 16 inches apart. C2077 (drawing).

Andy Grow, East's supervising engineer, said the outside edge of the steps, the edge furthest from the trailer, was four and one-eighth inches from the bulkhead to which they were welded. The inside edge of each step was two and one-half inches from the bulkhead. SUP C67 (75).

The trailer also has steps on its inside rear so drivers can climb out. SUP C183 (108). Trail Quest included those steps to allow drivers to get into and out of the trailer. SUP C176 (78). East knew drivers climb in and out of the trailer. Grow described that as a rare event but acknowledged it is an anticipated use of this trailer. SUP C75 (108-09). He described how drivers use the rear inside steps. SUP C81 (139-40). East's sales vice-president (Charlie David Wells) agreed it was foreseeable that a driver might use either set of steps to climb into and out of the trailer. C2425 (40). East's expert agreed Gillespie could as easily have lost his grip on the rear steps as on the front. C2325 (142).

Grab handle

A grab handle is a handle attached to the top front of the trailer to provide an extra point of contact. James Rohr, vice-president of Ken's Truck, denied ever seeing a grab handle on the front of a trailer. SUP C168 (46-47).

However, Grow testified that East offered grab handles on its trailers (SUP C75 (106)) and that East itself installed grab handles if they installed the tarp themselves (SUP C88 (158)).[2] Gillespie testified that almost all the aluminum trailers at Barge Terminal had a grab handle or bar at the top to help drivers lower themselves. C1799 (173).[3] East's expert reviewed a Barge Terminal mechanic's deposition and agreed the mechanic said he could install a grab handle at the top of the steps. C2313 (95-96).

Ladders as an alternative for egress and ingress

East and its competitors offer rung-style ladders as an alternative. SUP C70 (89), C71 (90), C75 (106), C80 (129). Drivers use rung-style ladders to climb out just as they use steps. SUP C77 (116-17). The only potential disadvantage to a ladder is that the tread is different. SUP C78 (119). One witness said a ladder costs East about $69 more than steps (SUP C85 (148)) and another said it was only slightly more expensive (C2436 (84)). Rohr said getting in and out would be easier with a ladder. SUP C173 (85). People at East climb ladders on the trailers. SUP C71 (91).

Wells from East said a ladder does not interfere with use of the trailer (C2429 (54)) and Robert Edmier, the president of Trail Quest, said a ladder would not interfere with the operation of the tarp cover (C1935 (77)). Another

[2] One witness said East would install only tarp caps if asked, not the cover itself. C2434 (76). The same witness said dump trailer buyers simply preferred the look of a cast ladder. C2436 (84).

[3] There was a potential for confusion in the appellate court because East's brief incorrectly said there actually was a grab handle at the top here. Def. app. ct. br. at 27.

witness said a ladder would not interfere with operation of the trailer other than potentially with a tarp. SUP C78 (120). Finally, Plaintiff's expert said a ladder could be installed that went within 12 inches of the top front edge of the trailer without preventing installation of an end cap (for the tarp cover). C2224 (242).

Edmier agreed a ladder could have been installed on the front. C1932 (62-63). Gillespie had seen ladders on the front of steel trailers, like a regular ladder but welded from the top to the bottom and spaced away from the trailer. C1793 (146-47), C1799 (172). The mechanic at Barge Terminal said such a ladder could be placed on a frameless aluminum trailer. C1793 (147).

Using the trailer

As described, the trailer has steps for getting in and out. C1928 (49). Steps also allow the driver to observe and direct the loading. C1770 (56-57), C1771 (58), C2389 (35). Someone climbing out would grab onto the trailer's top edge. SUP C77 (115), C83 (140). A driver coming down from the top first holds onto the top of the bulkhead and then onto the steps. C2390 (38); SUP C76 (113).

Edmier, the owner of Trail Quest and Barge Terminal, said a driver using the front steps would not be able to maintain the required three-point contact at the top because of the tarp shield or cap located there. C1948 (128-29). Three-point contact means the user maintains contact with either both hands and one foot or both feet and one hand. Only one foot or one hand is not

in contact at any given moment. The tarp cap or shield, a flat piece, does not present a holding surface for a trucker climbing down. C1953 (146).

Edmier thought drivers would use the rear steps because of the cap at the front. C1948 (129), C1953 (147). But Ed Coffman, East's design engineer, agreed East could foresee drivers might use the front steps to climb into and out of the trailer. C2425 (39-40), C2426 (41). Once the driver gets to the top step, he or she can no longer use the three-point method because the only thing left to grab is the top edge of the trailer. C2426 (43-44), C2427 (45).

Coffman said drivers rarely use the front steps to enter and rake the load. C2389 (36). However, as noted above, there was also evidence that loads have to be evenly distributed. C2425 (39). Grow said the steps allow the driver to watch and make sure the load is evenly distributed. SUP C65 (68).

A tarp makes a trailer more dangerous because it covers up the trailer's top edge and takes away the driver's ability to grip that edge when climbing in and out. SUP C77 (123), C80 (129), C86 (153). A trailer with a tarp cover but without a grab handle is not as safe as either a trailer without a tarp cover or one with a grab handle. SUP C89 (164-65). Grow expected an installer adding a tarp cap would also warn the end user. SUP C87 (156).

East was aware tarp covers are installed after the trailer leaves its factory.[4] SUP C78 (121). Wells had known for 30 years that people put tarp

[4] In the appellate court, East admitted knowing about the post-sale addition of tarps and that the addition was foreseeable, claiming only that it could not foresee what it called misuse. Def. app. ct. br. at 26. It dropped misuse here.

caps on the front of the trailer, covering the edge the driver was supposed to grab onto. C2434 (74). If a tarp cover is installed, the trailer is no longer safe. SUP C80 (129). Grow said tarp installers should do something to allow safe ingress and egress, including adding a warning. SUP C84 (145), C87 (155-56).

Trail Quest's purchase of the trailer and the tarp

Trail Quest, through Edmier, ordered this dump trailer from Ken's Truck Repair. Ken's purchased the trailer from East Manufacturing on behalf of Trail Quest (C1926 (39, 40)) and Trail Quest then leased it to Barge Terminal. Trail Quest selected and ordered the tarp cover. SUP C159 (10-11), C161 (19); C1928 (46). The trailer was 45 feet long and 12 feet high. C1765 (34).

East offered base designs to which buyers added accessories. SUP C55 (26). Rohr clarified he had not testified that Trail Quest ordered anything special, but rather simply "got a standard trailer that height with the standard steps that East provides with the trailer that height." SUP 190 (136). East's appellate court brief similarly characterized the trailer as a mix of standard and custom features. East app. ct. br. at 17, 25, available on re:SearchIL. After Ken's received the trailer from East, it added a Shur-Lok tarp cover that Trail Quest ordered through Ken's. C1945 (115, 117), C1927 (45).

The purchase process and the trailer assembly

Edmier testified that steps were not discussed during the negotiations for purchase of this trailer. C1928 (49). East acknowledged his testimony in

its appellate brief at page 24. Edmier distinguished this purchase from something like ordering a car in that they did not discuss every feature. C1926 (41). He wanted a spread axle and a swing gate and said there was not much more they discussed. C1926 (41), C1927 (42). There were no specifications for the steps.

The purchase documents confirm that neither Trail Quest nor Ken's Truck told East to use a specific means of allowing drivers to mount the trailer and did not specify the size or location of steps. The purchase order does not describe or call for any particular means of climbing onto the trailer. It refers only to outside and inside ladders. C2045. The specifications for the trailer list "ladders", but do not specify a type or kind. They show Trail Quest ordered it with standard outside and inside ladders, without further description. C2045 (purchase specifications). The internal Production Build Sheet mentions "ladders" but not the type of ladder or steps. C2047.

Coffman said they build what the customer wants, including whether steps go on the front or side. C2384 (13). East knew drivers would have to go up and down the front to gain access to the inside. C2386 (24). Ladders and steps are standard equipment and East offers steps or ladders on this trailer. C2384 (14-16). Steps are standard and a ladder is optional. Coffman said steps were the industry standard. C2386 (21). Wells agreed that East also sells the trailer with a rung-style ladder, with side rails. C2427 (48), 2428 (51-52); SUP C70 (89), C71 (90). He said a ladder does not interfere with use of the trailer.

C2429 (54). Solid waste trailers, used in a different business, have rung-style ladders as standard equipment. C2392 (47-48).

East can install a grab handle at the top. C2385 (17). Grab handles that Barge Terminal, a company related to Trail Quest, installed on other trailers cost $100. C1935 (76). Grow agreed East also offers grab handles. SUP C75 (106). Wells confirmed East installs grab handles at the top if the customer requests it. C2431 (61).

When East itself installs a tarp cover, it also installs a grab handle because that is safer. C2434 (76), C2435 (77). Coffman and Wells confirmed that when East installs a tarp cap, they install a grab handle on that cap. C2412 (128), C2413 (129), C2414 (134-35), C2431 (63-64). East would not allow a dump trailer equipped with a tarp cover to leave its facility without a grab handle because that would not be safe. C2435 (77-78).

The trailers are built to Federal Motor Vehicle Safety Standards (FMVSS). C2395 (60). Coffman said FMVSS standards do not apply to steps or ladders. C2405 (116). Grow said there is no regulation for the steps. SUP C65 (69). There are OSHA regulations for ladders but not for trailers. SUP C70 (90).

East does not put the top step closer than 19 inches to the top edge, to leave room for a tarp cover. C2398 (71-72). Customers could also ask for handrails (a ladder with side rails). C2403 (92). East has never made a trailer with handrails. C2403 (92). Coffman believed handrails are not safer because

if your foot slips, your hand will slide down the handrail. C2404 (93). He thought it would be more dangerous to lean over to reach a handrail. C2404 (95).

That buyers add tarps was common knowledge in the industry. C2332 (67-68). East in its appellate court brief acknowledged that the addition of a tarp cover was foreseeable. Def. app. ct. br. at 21, 26. East was aware tarps are installed as aftermarket products and that it was very possible a tarp would block the driver from grabbing the top edge of the trailer as an anchor point. C2397 (67), C2404 (117), C2411 (122), C2412 (127).

If the customer installs a tarp, it covers the top edge which the user would otherwise grab. C2398 (69). The cap removed the top part of the bulkhead as a grab handle (C2410 (118-19)), preventing the three-point safety protocol Coffman described (C2410 (118)).

East's Statement of Facts characterizes the trailer as custom-built. Plaintiff pointed above ("Trail Quest's purchase") to evidence showing that is not correct. East's intent is to imply that the purchaser rather than East is responsible for the component parts and or the absence of a handle, a ladder, and a warning, although it does not make that point in its Argument. To avoid any implication that it was a custom trailer, Plaintiff notes that where a purchaser provides general specifications but leaves the details to the manufacturer, the manufacturer remains responsible for the ultimate

condition. *Bittler v. Doyen & Associates, Inc.*, 271 Ill. App. 3d 645, 649–50, 648 N.E.2d 1028, 1031 (1995).

The plaintiff there claimed a purchaser who provided some design specifications was responsible for missing safety features. That court noted the plaintiffs were arguing that compilation of design specifications (by the purchaser) was tantamount to the purchaser designing the product being ordered, leaving the manufacturer off the hook. The court rejected that reasoning, ruling the buyer merely assembled a list of attributes which its contractor was to include in the final product. Trail Quest used the same procedure here, providing East with general specifications but not defining how steps were to be sized or spaced and not addressing a grab handle or a rung-style ladder. It was thus not a custom trailer.

General regulations

OSHA requires that steps on ladders generally be not less than ten inches nor more than 14 inches apart. C2086 (§1910.23(b)(2)). Steps on fixed ladders must have a minimum width of 16 inches. *Id.* (§1910.23(b)(4); C2092. The minimum distance allowed between the front edge of the rung and the nearest object behind it (here, the trailer bulkhead) is 7 inches. C2089 (1910.23(d)(2)). ANSI requires that steps be no more than 12 inches apart and each step must be 16 inches wide. C2121 (§5.1.1, 5.1.2), C2137. The FMCSR requires steps at least 10 inches wide. C2154 (§399.207(b)(4).

The Truck Trailer Manufacturers Association's (TTMA) Recommended Practices requires steps on tank trailers to be at least 12 inches wide and not less than 10 inches nor more than 12 inches apart. C2832 (5.4 and 5.9) (v3). East's expert read from that TTMA standard where it said the recommended practice at issue could be applied to bulk dry trailers like this East trailer. C2307 (70-71). East's expert agreed the steps on this trailer violated TTMA guidelines. C2308 (73). Toe clearance (the distance between the rung and the object to which it is attached) must be more than six inches. C2308 (74-75); C2832 (5.10) (vol. 3).

East did not rebut the step geometry evidence.

Plaintiffs' expert witness

Gary Hutter, plaintiffs' expert engineer, opined that the front trailer steps were not compliant with the fixed ladder criteria of OSHA, ANSI, and the National Safety Council, or with general literature. C2195 (128). The steps had no platform (C2195 (128)), were not the proper width, did not have the proper toe distance, did not have side rails, had too much distance between them, and provided no convenient place to hold onto (C2196 (129-30)). East's expert established that the purpose of those length and width requirements addressing step geometry was to ensure that a driver can get enough of his foot on a step to be able to safely climb up and down. C2303 (50).

The various codes also show what a compliant ladder looks like. C2196 (132). In addition to relying on the various standards, Hutter pointed to

ladders East had purchased as examples of safe ladders. C2196 (131). And he further noted that sales literature from ladder manufacturers showed a proper design that would have met custom and practice standards. C2196 (131-32). Code requirements were described above.

Hutter also opined that vehicles are subject to OSHA while being loaded. C2210 (187-88). SAE standards for off-road vehicles provide toe distances, rung to rung distances, the width of the step, and width of side rails. C2213 (199). SAE and similar industry standards set out what is reasonably safe and are the industry custom and standard. C2215 (205). Hutter reasoned that if the steps or the absence of a ladder on this trailer violated OSHA in the context of a wall in a plant, the steps and the absence of a ladder would also be unsafe on this trailer. C2255 (362).

Hutter added that East puts a full ladder on its waste trailers (C2284 (479)) and that many manufacturers put full ladders on the front of their trailers. C2285 (483). This was a dump trailer. A ladder could be installed that went to within 12 inches of the top front edge of this trailer without preventing installation of an end cap (for the tarp cover). C2224 (242). Hutter also identified examples of trailers with ladders. C2286 (489).

Proceedings in the Circuit Court

East Manufacturing moved for summary judgment. C2005. Its primary argument was that Plaintiff forfeited any claim arising out of the post-sale addition of the tarp cover even if that was foreseeable because of what East termed a judicial admission that the only issue involved the trailer's condition

at the moment it left East. C2006-08. The trial court rejected that contention, as did the appellate court. East abandoned that argument here.

East's motion then addressed the negligence count, arguing that the customer did not order a grab handle or rung ladder.[5] C2010-2013. East's motion next challenged the product liability count without distinguishing between the consumer expectation and risk-utility tests. Plaintiff's response specifically noted he could prove his case under either test (C2061), and East's reply did not contest that. C2006, C2014.

East stressed its contention that its trailer was safe as a matter of law because it met government and industry standards, relying on the expertise of its employees. C2017; Def. app ct. br. at 11 (acknowledging it made that argument in the trial court). Ironically, that is the opposite of East's position here where it challenges use of the standards. Even though it had deposed Plaintiff's expert (C2164) and knew he relied on those standards, East did not challenge his reliance on those standards until it replied. C2991.

Its motion also said that *if* it had asked Ken's, it would have learned this purchaser did not expect drivers to use the front steps. C2017. In East's Response to a motion by Barge Terminal, East acknowledged that no one at

[5] For clarity, Plaintiff notes the appellate court in note 2 said Plaintiff had not challenged the negligence count ruling. In fact, Plaintiff noted in note 1 at page 24 of his appellate brief that the law was essentially the same for both negligence and product liability where the charge was unsafe design, intending to mean the argument was the same for both theories of recovery. See discussion in *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 270 (2007). However, Plaintiff has no need to press that count and it is not material here.

Barge Terminal had "bothered to tell Gillespie" not to use the front steps. C2070.

As to the grab handle, East said its contract did not require one but rather that the need was created by the allegedly unforeseeable installation of the tarp cover. C2015-16.[6] It made the latter claim despite on the same page acknowledging Well's testimony that the tarp addition was foreseeable. C2016. As to the absence of a warning to the buyer to add a grab handle if it installed a tarp cover, it claimed that was unnecessary because the danger was open and obvious and because Gillespie could have used the rear steps. C2018-19.

Plaintiff responded, focusing on the steps rather than the trailer. C2053, C2556 (exhibits). The dimensional aspects of the steps are referred to jointly as step geometry. He argued the step geometry and the absence of a grab handle made the trailer dangerous under both the consumer expectation test and the risk-utility test. C2061. Plaintiff pointed out that his expert said the step design was unsafe, relying among other things on industry and government standards setting criteria for step geometry including dimensions and distance from the wall. C2054-55, 61.

The expert's opinions included that the improperly small distance between the step and the trailer meant the user had to place his weight on the front of his foot rather the middle. C2055. East's expert, Morgan, agreed the

[6] At that point, East's motion acknowledged its vice-president testified that installation of the tarp cap was foreseeable. C2016.

purpose of the step geometry requirements in the standards was to allow the driver to get enough of his foot onto the step to be able to safely climb up and down. C2302 (50).

As to the ladder, Plaintiff pointed out that a rung-style ladder would come with steps that were OSHA compliant and extended to the top of the trailer. C2056. Such a ladder would extend 12 inches from the trailer, leaving room to install a tarp cap. C2062. Plaintiff noted East had not provided evidence that a rung-style ladder would interfere with any feature of the trailer. C2062.

As to the grab handle, Plaintiff pointed to East's knowledge that buyers almost always add tarp covers which in turn make a grab handle necessary, and to the fact that East had installed grab handles on other trailers. C2057. Plaintiff added that the trailer was unreasonably dangerous even if East's post-sale modification argument was correct because the step geometry defects presented a separate issue. C2057. Finally, as to the warning issue, Plaintiff said a warning was required to alert the buyer of the need to add a grab handle if it added a tarp cover. C2058, C2064.

East in reply argued that OSHA could not be considered as to the steps because it governed only employer conduct, and also that OSHA, ANSI, TTMA, and FMSCA did not apply to trailers. C2993, C2996. East also repeated its earlier contention that it could never be liable because its trailer complied with OSHA and the other regulations. C2997, C3003. East agreed it was aware a

tarp cover might be installed later. C3001. Such covers are required to prevent product from spilling out. C2317 (112), C2318 (113). East did not argue that a tarp cap precluded use of a grab handle. C3001.

As to the warning issue, East pointed to its label warning that steps were slippery when wet. C3001. It said the tarp manufacturer provided a label warning drivers not to climb or stand on the cap, but cited no support. C3002. It pointed out that one employee said the tarp cap prevented him from using the front steps, but Plaintiff had used the steps for years. C3002. In addition, for the first time East accused Plaintiff of misuse, a claim it dropped on appeal. C3004.

The sequencing and content of those pleadings show the procedural frailties that affect the appeal. East's main issue here, the propriety of the expert's use of regulation and standards, was not raised in the trial court until East's reply. Plaintiff thus had no opportunity to address that objection, to clarify his expert's use of the standards, or to meet the objection by seeing whether the expert might better explain his use of the standards or add alternative bases for his opinion about step geometry. Then in responding to Plaintiff on appeal, East addressed whether the various standards applied to trailers rather than addressing whether Plaintiff's expert could rely on them. For those reasons, the issue of what an expert can rely on with respect to regulations and standards was not well developed.

Circuit court decision

The circuit court said East's central argument was that East built the trailer pursuant to directions, that the buyer modified it by adding the tarp cover, and that the modification meant the trailer was not unreasonably dangerous when it left East's control. C3008; SUP C244. As to the arguments about OSHA and industry standards, the court summarily said OSHA does not apply to trailers and that industry standards were not mandatory. It repeated its belief that the post-sale modification prevented any liability on East's part.

Appellate court decision

The appellate court first disposed of East's judicial admission argument. It then addressed both the risk-utility and the consumer expectation tests, including the factors relevant to the former. *Gillespie v. Edmier*, 2019 IL App (1st) 172549, ¶¶ 34, 40, 136 N.E.3d 1029, 1038-39. It found a question of material fact under both tests, pointing to the expert's opinions about unsafe steps and the absence of a ladder and noting that the expert could rely on the protocols as support for his opinions. *Id.* at ¶¶ 44, 48, 53. It also held that East could foresee the addition of the tarp cover and that the evidence created a question of fact about the need to warn the purchaser to add a grab handle if it installed a tarp cover. *Id.* at ¶¶ 54, 60, 64.

ARGUMENT

I. Government regulations and industry standards addressing the dimension and spacing of steps and ladders can serve as a basis for an expert's opinion about whether steps used on a product are unreasonably dangerous.

[Answer to def. br. at 24-37.]

Wilson v. Clark permits experts to rely on regulations and standards.

East Manufacturing characterizes the issue as whether it will be forced to build trailers in compliance with federal standards and industry guidelines that do not specifically address trailers. But the case did not come to this Court with that question. The issue is much more limited. The appellate court described the issue as simply whether the steps complied with various recommended practices under OSHA, ANSI, FMCSR, and TTMA. *Gillespie v. Edmier*, 2019 IL App (1st) 172549, ¶ 43, 136 N.E.3d 1029, 1039. That characterization tracked East's explanation there. East told that court the question was whether the standards relied on by Plaintiff's expert (Hutter) could be used to evaluate the safety of the steps where those standards did not specifically address trailers. Def. app. ct. br. at 27.

Addressing East's issue, the court in approving Hutter's use of such standards pointed to his testimony that "the steps' spacing, width, distance, and lack of side rails conflict with the OSHA protocol." In other words, the court in finding a question of fact as to whether the steps were unreasonably dangerous relied on Hutter's opinions about safety and those opinions were

bolstered by step geometry requirements described in OSHA and the other safety protocols.

This Court's decision in *Wilson v. Clark*, 84 Ill. 2d 186, 193, 417 N.E.2d 1322, 1326 (1981) controls here. The Court, adopting FRE 793, established that experts can base opinions on facts or data reasonably relied upon by experts in the particular field even if the facts or data are not admissible in evidence. The various regulations and guidelines Hutter used as a foundation for his opinions constitute just such data. Whether OSHA and the other protocols mentioned by Hutter are also admissible in evidence is not the touchstone for this appeal.

Allowing experts to rely on such data makes sense because such data is not disclosed to the jury for the truth of the matter asserted, but rather only for the limited purpose of explaining the basis for the expert's opinion. *Grauer v. Clare Oaks*, 2019 IL App (1st) 180835, ¶ 75, 136 N.E.3d 123, 147–48. In that scenario, the data therefore does not establish a standard to which the defendant manufacturer must adhere. Admissibility of standards into evidence as binding presents a separate question, one premature at this juncture. The distinction between those two uses of such data was acknowledged in *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601, 607–08 (6th Cir. 1985), cited by East. It noted the trial court had refused to admit regulations into evidence, but that the jury heard about them when experts read and

commented on their text. That is what occurred here, the only difference being that it came at the motion stage rather than the trial stage.

The fact that the step geometry here did not meet the dimensions set out in the recited protocols was "intended to support (Hutter's) expert opinion" that the step dimensions and spacing made them unreasonably dangerous, the same analytical process the *Grauer* court applied. *Gillespie*, *supra* at ¶ 45. The appellate court approved that use of the standards here, holding that Hutter's testimony provided "sufficient evidence that a fact finder could consider when determining whether the steps were unreasonably dangerous." *Id.* In other words, the court found that OSHA and the other standards supported Hutter's opinions. His opinions were in turn evidence a jury will consider in judging the merits of the step design when the case goes to trial.

East claims, without explanation, that Hutter's references to the regulations would not assist the jury in understanding why step size and spacing were dangerous. Def. br. at 36. But as with any standard, these standards would show a jury what is deemed safe by other authorities so the jury could understand that there is a basis for the opinions. The cited authorities back up Hutter's opinions about what step geometry is safe.

The appellate court also pointed out that East itself had relied on the same standards – it offered evidence that its trailer complied with industry standards. *Id.* ¶ 46. In fact, that was one of East's main points in its summary judgment motion. C2017. Its argument there was seemingly also premised on

its additional belief that the safety protocols were themselves admissible into evidence. East cannot have it both ways. If compliance with the various protocols is itself evidence that its steps were safe, as it argued in both the trial and appellate courts, it cannot object to Plaintiff's use of those protocols as support for his expert's opinion that the steps were unreasonably dangerous. At a minimum, by its prior arguments, East surely forfeited any right to object to Hutter's use of the protocols to support his opinions, a non-evidentiary purpose.

Whether the standards may be admissible into evidence is not dispositive of the appeal.

East Manufacturing implies the question is whether the standards themselves can come into evidence to establish a standard of care. See, e.g., Def. br. at 26. But that would be an IPI 60.01 issue and Plaintiff does not require the standards to be admitted as substantive evidence in order to be entitled to affirmance of the reversal of the summary judgment. As noted, Plaintiff's expert simply relied on those standards pursuant to *Wilson v. Clark*.

The appellate court's analysis was unremarkable because it simply followed *Wilson* and the well-established protocols for such expert testimony developed in reliance on *Wilson*. The standards were thus properly used by the experts regardless of whether they are independently admissible as substantive evidence, and that alone leads to affirmance.

There is no reason to limit use of such standards to products explicitly targeted by the standards.

In reality, East seeks to change the protocol customarily employed by experts. It wants to modify *Wilson v. Clark* so that experts can no longer rely on government standards and industry regulations unless those standards and regulations are directed solely to the product in question. But it provides no reason for that change, and adopting its position would undo cases like *Caburnay v. Norwegian Am. Hosp.*, 2011 IL App (1st) 101740, ¶ 24, 963 N.E.2d 1021, 1027.

There, an expert pointed without objection to general American National Standards about tripping hazards as a basis for opining that the mere placement of a floor mat can present a potential tripping hazard. The expert thus relied on standards despite the fact that they were not directed at floor mats. It is also instructive to note that courts have allowed experts to rely on standards even where the standards were not adopted until *after* the incident at issue. *McShane v. Chicago Inv. Corp.*, 235 Ill. App. 3d 860, 877–78, 601 N.E.2d 1238, 1250–51 (1992).

The *McShane* court explained that use of ANSI standards not in effect at the time of the accident was nonetheless appropriate because the standard was not introduced to show a violation. Rather, it was used *by the expert* as evidence of general negligence. If an expert can rely on a standard that did not even exist at the time of the incident, then surely he or she should be able to use relevant parts of standards that were in existence even if they do not

address the specific device at issue, so long as the standards' content supports the opinion.

In addition, this is not a one-sided question because experts on both sides of the personal injury arena have relied on standards. *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 267, 864 N.E.2d 249, 262 (2007) (defendant argued that the CPSC exempted its utility lighters from the standard until later); *Dugan v. Sears, Roebuck & Co.*, 113 Ill. App. 3d 740, 741, 447 N.E.2d 1055, 1056–57 (1983), aff'd on reh. at 454 N.E.2d 64 (defendant allowed to show alternative designs not required by ANSI, a rule the plaintiff acknowledged on rehearing after *Moehle*). *Dugan* cited Cleary and Graham, *Handbook of Illinois Evidence* § 401.13, at 113 (1979) for its statement that defendants can generally point to compliance with standards and regulations to show an absence of culpable conduct in a product liability action. The general use by both sides of such standards illustrates their use by experts is fair and that all parties have accepted this use.

It is also instructive that an expert can rely even on hearsay, a protocol approved in *J.L. Simmons Co., Inc. ex rel. Hartford Ins. Group v. Firestone Tire & Rubber Co.*, 108 Ill. 2d 106, 116–17, 483 N.E.2d 273, 278 (1985). That being the case, Plaintiff asks why courts would want to bar experts from relying on examples of safe step geometry set out in government regulations and industry standards except in the instance where the standards specifically

address the product at issue? Surely the standards carry a markedly higher degree of reliability than hearsay.

Opposing parties are protected from undue prejudice from that use of such data. They can bring out on cross-examination any limits or restrictions in the facts or data being relied on that would make reliance on them inappropriate in the particular situation on trial. *Melecosky v. McCarthy Bros. Co.*, 115 Ill. 2d 209, 215–17, 503 N.E.2d 355, 358 (1986). That protection was illustrated in *Dugan v. Sears, Roebuck & Co.*, *supra* at 741. The court noted that the plaintiff was protected from undue prejudice from use of ANSI standards because counsel could use cross-examination and argument to put the standards into the proper perspective.

The *Dugan* court also rejected the plaintiff's contention that the expert should not have been allowed to use the standard because the standard did not call for tests concerning the type of incident which caused the injury. In other words, the plaintiff argued that the standard should not be used because it did not specifically govern the type of occurrence at issue, and the court rejected that argument. That it is customary to use standards in this kind of situation is reflected in *Patel v. Brown Mach. Co.*, 264 Ill. App. 3d 1039, 1048, 637 N.E.2d 491, 497 (1994). East's argument is that experts should not be allowed to rely on standards not specifically written to govern the product at issue. But the expert in *Patel* relied on an ANSI standard that applied to some presses but

not to the type of press at issue, without objection. Instructively, the parties in *Patel* did not even see that as an issue.

There may be instances where a step design or other example shown in a standard could not possibly work in the circumstance at issue in the trial, so the standard would be inapplicable on its face. But East did not show that. It did not explain why changing the step width or its distance from the trailer wall or their spacing to meet the dimensions called for in the cited standards was impossible or inappropriate for this trailer.

In fact, the conduct involved in using a step or a ladder will usually be the same regardless of where either one is being used. No matter the context, someone will ordinarily be relying on a step or a ladder for support. The standards at issue are intended to reduce the risk of falling in that situation by requiring a step geometry deemed to provide the most secure footing. That is true no matter where the steps or ladder are used, so logically the design set out in the standards should be applicable everywhere.

If the step geometry in the standards was inappropriate for designing trailer steps, East or its expert would surely have provided that information. Notably, East provided no such evidence. In fact, no one disagreed with Hutter's analysis about why the step geometry was unsafe. Certainly its expert did not. C2290 (Morgan deposition.). East's expert agreed his expertise was limited to whether regulations applied to a device (C2294 (20), C2295 (24)) and he could not even say whether using TTMA's recommended practices could

result in a safer trailer (C2309 (80), C2310 (81)). The bottom line is that Hutter's opinions about the safety merits of all four components at issue stand uncontradicted.

This Court has approved use of standards like these by expert witnesses.

This Court in *Schultz v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 201 Ill. 2d 260, 298, 775 N.E.2d 964, 986 (2002), actually answered the question of whether courts can consider regulations technically not specifically addressing the device or thing in issue. There, the plaintiff switchman who fell from a retaining wall after dismounting from a train brought an FELA action against his employer. The Court first found that the wall was not subject to OSHA regulations and therefore concluded the railroad had not violated OSHA. *Id.* at 293.

The Court went on to address whether the plaintiff's expert was properly allowed to testify that OSHA and other safety standards requiring a guardrail wherever the property's elevation changed indicated a standard of care. *Id.* at 296. The Court first confirmed again that OSHA did not regulate that wall or the area around it. But the Court nonetheless agreed with the plaintiff and the appellate court that the expert could describe and rely on the standards. The jury was properly instructed that although OSHA and the other standards did not bind the defendant, the jury could consider them in determining whether the railroad provided a reasonably safe place to work.

The Court next addressed the specific issue here. It first noted the rule that an expert must be allowed to testify regarding the basis for opinions. *Id.* at 298-99. It then approved allowing the expert's testimony that every standard on the books recognized that a change of level was a fault requiring a guardrail "because that (standard) was simply intended to support his expert opinion that defendant was negligent in failing to install a guardrail above the retaining wall." The Court allowed use of the OSHA regulation because it provided a basis for the expert's opinion, in turn allowing the jury to conclude that the opinion was not simply an arbitrary conclusion pulled out of thin air. *Schultz* addressed conduct rather than a product, but as Plaintiff noted earlier in footnote five, negligent conduct and an alleged design defect present very similar issues, so the distinction is one without a difference.

The appellate court in *LePage v. Walsh Const. Co., Ltd.*, 126 Ill. App. 3d 1075, 1076–77, 468 N.E.2d 509, 510–11 (1984), followed *Schultz*, holding OSHA rules admissible as standards in determining liability even in the absence of an employer-employee relationship. And *Turney v. Ford Motor Co.*, 94 Ill. App. 3d 678, 685, 418 N.E.2d 1079, 1084–85 (1981) followed *Rucker* and anticipated *Schultz*.

The outcome in *Schulz* was not surprising in light of the Court's earlier ruling in *Rucker v. Norfolk & W. Ry. Co.*, 77 Ill. 2d 434, 438–39, 396 N.E.2d 534, 536-37 (1979), that experts can rely on government and industry standards as a basis for opinions. A tank car exploded, killing a railroad

employee. His estate brought a product liability action against the tank car's manufacturer. After losing, the manufacturer appealed, arguing it should have been allowed to introduce evidence that its car complied with Federal standards. *Id.* at 436-37.

The Court pointed out that it had earlier concluded a plaintiff can prove a design defect case by introducing evidence of a feasible alternative design. Based on that, the Court said that also meant evidence of compliance with Federal standards is relevant to whether a product was defective and to whether the defective condition was unreasonably dangerous. *Id.* at 437-38. The Court concluded the finder of fact could take into account that such compliance with a standard might mean the product was not defective or not unreasonably dangerous.

The Court in *Rucker* rejected the plaintiff's fear that such evidence might improperly direct the jury's attention to the manufacturer's conduct rather than the condition of the product, similar to East's complaint. That decision was subsequently construed to mean it was equally true that lack of compliance with standards was also evidence that a product was unsafe. In other words, both sides could look to such standards.

It is true, as East says, that the standard relied on in *Rucker* addressed the product at issue, the tank car. But that was not the basis for the Court's decision, at least not on its face. The question was whether the standard supported the expert's opinion and that is precisely what is at issue here. The

regulations and standards Hutter pointed to support his opinion that the trailer's step geometry was unsafe and that a ladder was a preferable support device. From that, a jury could conclude the steps were unsafe and that East should have provided a rung-style ladder.

East's contrary authorities are inapposite.

East points to *Ruffiner v. Material Serv. Corp.*, 116 Ill. 2d 53, 58–59, 506 N.E.2d 581, 584 (1987), as contrary authority. Def. br. at 25. There, the plaintiff's' expert testified during trial that the ladder on a tugboat's movable pilot house did not comply with an ANSI standard for fixed ladders. The expert admitted that compliance with the standard would have made the ladders too big for the ladder well, so compliance was impossible in that unique scenario.

The Court first noted that standards may be relevant in a product liability action in determining whether a condition is unreasonably dangerous even though they had not been imposed by statute or a regulatory body and therefore did not have the force of law. *Id.* at 58-59. That is Plaintiff's position here. Then, although the expert there testified that using the dimensions provided in the standard would mean the resulting ladder could not be used, the Court nonetheless said the nature of the ladder would not itself prevent the ladder from having the prescribed dimensions, despite the expert's admission that such a ladder was not usable.

The Court instead relied on what it called a more general objection, that the standards addressed fixed ladders used in land-based facilities. From that,

it reasoned the record did not present an adequate foundation for using the standards because the expert said only that a design goal for shipboard ladders was safety rather than explaining why the standards were relevant to the facts at hand in that case. The Court therefore concluded that "admission of the standards into evidence was error." *Id.* at 60.

That last quote illustrates the ambiguity in *Ruffiner* that prevents it from being controlling authority in product cases involving use of standards like those at issue here. The opinion does not mention *Wilson*, likely because counsel did not raise the case. And it speaks of admitting standards *into evidence*, the latter being what we would see if a statute applied to and controlled the conduct at issue. In that circumstance, the statute or binding regulation would go to the jury as evidence of the standard of care and would have the force of law. See the Introduction to IPI (Second) 60.00 Statutory Violations, and the Notes on Use for IPI 60.01. Violation of such a statute is *prima facie* evidence of fault.[7]

But as discussed above, admitting regulations into evidence is critically distinct from allowing experts to rely on them as bases for an opinion. For that reason, that ambiguity in *Ruffiner*, without further explanation by the Court, prevents it from providing guidance in this or similar cases.

East also relies on *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430. Preliminarily, Plaintiffs suggest that if East truly thought *Zickuhr* was

[7] As the Notes illustrate, even that principle is not completely clear because courts on occasion have allowed 60.01 where the standard did not have the force of law.

persuasive authority for its contention that OSHA can be considered only where an employer's conduct is at issue, it would have cited that case in its appellate court brief. It did not.

In any event, *Zickuhr's* irrelevance is illustrated by the fact that although West shows it has been cited more than 60 times, it was never cited for the issue of whether OSHA can be considered in non-employer cases. That the case dropped off the charts with respect to whether OSHA can be relevant in product liability cases is likely explained by the fact that the point on which East relies was *dicta*. The *Zickuhr* court initially noted the defendant waived its "OSHA standard" issue by failing to make an offer of proof, rendering further discussion of that question *dicta*. *Id.* at ¶ 64.

Further, the section discussing OSHA (the only standard at issue there) began with a recitation that the issue was the exclusion of evidence rather than correctly noting that the real issue was whether an expert could rely on OSHA. *Id.* at ¶ 62. It repeated that. *Id.* at ¶ 69 (saying evidence of regulations was irrelevant).

In any event, in affirming the trial court's discretion in barring use of OSHA, the court relied on the fact that the defendant cited no law identifying instances where an OSHA asbestos regulation had been applied to a manufacturer. *Id.* at ¶ 66. Right or wrong, the court evidently believed there was also a procedural waiver, undercutting the case as precedent. If anything, the case is an outlier, relegated to the sidelines.

Such standards satisfy this Court's "time and conduct involved" guideline.

East contends a standard cannot be relied on unless it is "relevant in terms of both time and conduct involved", pointing to *Murphy v. Messerschmidt*, 68 Ill. 2d 79, 84, 368 N.E.2d 1299, 1302 (1977). However, unless the standard at issue is in some way specifically limited to the device it addresses and could not logically be instructive in any context other than that addressed by the standard, it is normally likely to be "relevant in terms of both time and conduct involved."

Here, the time period is irrelevant and the *McShane* case showed time is often irrelevant. As to the conduct involved, a product liability case does not involve conduct, so literal application of that guideline is impossible. To the extent *Murphy's* "conduct" guideline can be applied in a product case, it is satisfied here because the standards at issue are relevant to the design of the product in the sense that they serve as an example of how steps should be safely designed and when a ladder is needed.

If a step with a geometry different than that shown in a standard constitutes a safety hazard in the context addressed by that standard, it is in all likelihood a safety hazard in other contexts including this one. Hutter's testimony that the standards serve as examples of safer step and ladder design is true regardless of the specific focus of the standards. And none of the standards Hutter pointed to indicate that the step geometry set out in them

was arrived at in response to some unique scenario that could never apply to the general world.

Plaintiff prevails even if his expert cannot rely on the cited standards.

Finally, even if this Court finds that Hutter cannot rely on the various standards, that does not require reversal. As in *Ruffiner*, such a ruling would not end Plaintiff's case. Plaintiff can still prove his risk-utility claim through Hutter who will describe the dimensions of the stairs and explain why they are unsafe, just as the plaintiff in *Ruffiner* alternatively proved liability by pointing to a slippery stair.

The only thing that will change in the event the Court rules adversely to Plaintiff on this issue will be the limits on what his expert (and East's expert) can rely on as bases for opinions. Additionally, Hutter referred alternatively to the National Safety Council, sales literature, and custom and practice standards. And as to ladders, he pointed to ladders East had purchased as examples of safe ladders. C2196. All those remain in play.

Hutter can also rely on his expertise and training, and on common sense, in opining that the steps are unsafe and that a rung-style ladder was required. As East's expert agreed when asked about the purpose of the TTMA and other standards, the aim of having a sufficient distance between the step and the wall was to allow the worker "to get enough of his foot on the step to be able to safely climb up and down." C2303 (50). Nothing will prevent Hutter from offering that explanation even if he is not allowed to refer to the standards.

Plaintiff also prevails even if his expert cannot rely on standards for a risk-utility analysis because his claim rests on alternative theories.

In addition, as Plaintiff noted when resisting the petition for leave to appeal, the risk-utility test is one of two tests used when seeking recovery under product liability, the other being consumer expectation. Further, the "standards" issue raised by East in opposition to the risk-utility claim affects only the step geometry and ladder subsets of that claim. East's "standards" argument does not affect or restrict risk-utility claims based on East's failure to install a grab handle or to warn purchasers who install a tarp cover to also install a grab handle. The appellate decision will thus stand regardless of the outcome of this first point.

Finally, East's Petition for Leave to Appeal complained that the decision meant it would have to take into consideration each state's tort law when designing its trailers. But the Court in *Rucker* already established that state tort law controls claims like this. Affirmance would not create any duty beyond that East already has, a duty under common law to design a safe step and provide a ladder on its trailers.

I-A. The regulations and standards can also be admitted as substantive evidence.

The above argument establishes that experts can rely on regulations and standards as a basis for an opinion so long as the standards logically lend support to that opinion. That is all that is needed to affirm. However,

Plaintiff's expert also described why he believed the standards on their face mandated compliance with respect to the trailer. He said vehicles are subject to OSHA while being loaded (C2210 (187-88)), SAE standards for off-road vehicles provide proper step geometry (C2213 (199)), and SAE and similar industry standards are the industry custom and standard (C2215 (205)).

That testimony at a minimum created a question of fact as to whether the various standards are admissible as substantive evidence that can be given to the jury through IPI 60.01. The arguments for the relevance of the standards are the same as those made in the prior point.

Introduction to Points II through VIII.

Defendant's Points Relied on For Review did not mention the next seven specific issues. Its Petition for Leave to Appeal pointed to just one issue: whether Plaintiff's expert could rely on the various regulations and standards discussed in Point I.

Failure to raise an issue in the petition for leave to appeal may be deemed a forfeiture. *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 320–21, 882 N.E.2d 525, 535–36 (2008) (by failing to raise the scope issue in its petition, petitioner forfeited that issue; raising the issue in the brief does not cure the forfeiture). East has forfeited each of the following issues. Because Plaintiff cannot know how the Court will rule, he nonetheless addresses each issue.

II. Defendant forfeited the feasibility issue with respect to a rung-style ladder issue by not raising it below. Even if the Court considers the issue, Plaintiff adduced evidence that a rung-style ladder is feasible.

[Answer to Def. br. at 37-40.]

East contends there was no evidence that a rung-style ladder, an alternative to the individual steps welded to the trailer, was feasible. Def. br. at 37. To avoid confusion concerning references to steps and ladders, Plaintiff notes that witnesses and counsel sometimes referred to the steps on the front as a ladder. See, e.g., Def. br. at 16, referring to the "ladder" on the dump trailer. When Plaintiff talks about a rung-style ladder, he refers to the separate ladder with side rails described by Hutter, similar to a standard free-standing ladder but welded to the front of the trailer as a single unit.

A ladder possesses several advantages over individual steps. Side rails provide a round vertical surface to grip, it extends from the top of the tarp cap to the bottom of the trailer, and it is spaced away from the trailer. It thus allows easier access for a driver coming down from the top of the load because he does not need to reach below the level of the cap to grip it. C1793 (146-47), C1799 (172).

Preliminarily, Plaintiff notes East did not contest or challenge feasibility below. Its Motion for Summary Judgment does not mention feasibility. C2005. A word search of its appellate court brief shows no mention of feasibility and only one mention of feasible at page 15, the latter part of an OSHA quote not suggesting anything about ladders. Issues not raised in the trial court or the appellate court are waived. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536,

662 N.E.2d 1248, 1253 (1996) (issues not raised in the trial court are waived and may not be raised for the first time on appeal); *Johnson Press of Am., Inc. v. N. Ins. Co. of New York*, 339 Ill. App. 3d 864, 874, 791 N.E.2d 1291, 1300 (2003).

In any event, Plaintiff showed feasibility. Both East and its competitors offered rung-style ladders. C2384 (15-16), C2385 (17) (rung-style ladder is an option and witness had seen this frameless dump trailer with grab handles); SUP C70 (89), C71 (90), C75 (106), C80 (129). Wells said a rung-style ladder had been available on dump trailers (this was a dump trailer) for many years and that the trailers have been sold with such ladders. C2427 (48), 2430 (59). The only potential disadvantage is that the tread is different. SUP C78 (119). Cost is not a factor because a ladder costs East only about $69 more than steps. SUP C85 (148).

Wells confirmed a ladder does not interfere with use of the trailer. C2429 (54). Gillespie similarly testified, without rebuttal, that he has seen ladders on the front of steel trailers and that the mechanic told him such a ladder could be placed on a frameless aluminum trailer like this. C1793 (146-47), C1799 (172).

Finally, even if the feasibility of using a ladder is deemed closed despite East's forfeiture and despite the evidence, the appellate court decision must nonetheless be affirmed because the decision alternatively rests on the evidence of defective steps, the absence of a grab handle, and the failure to

warn the buyer to install a handle if it installed a tarp cover, matters not affected by East's feasibility argument.

III. East's evidence that it had not heard of injuries resulting from use of this style of steps is not dispositive of the risk-utility claim.

[Answer to Def. br. at 40-41.]

East contends it was not aware of other injuries resulting from using this style of steps and that its lack of knowledge insulates it from a duty to use safer steps. Def. br. at 41. Preliminarily, Plaintiff notes that East quotes Edmier, the owner of Barge Terminal and Trail Quest, as not hearing of such injuries. However, what Edmier and Trial Quest might have heard is not relevant to what defendant East Manufacturing knew or should have known. The quote therefore does not support East's contention.

East's contention that it did not know of other accidents and that this means there were in fact no such other accidents is for a jury to decide. That is especially true here where the most knowledgeable person at the manufacturer as to whether these steps were safe testified he had no idea how many people had fallen from the steps of this trailer in the last 40 years. SUP C68 (81). In addition, East is relatively small and thus represents a small part of the universe comprising all dump trailer manufacturers. Consequently, there is no reason to believe its knowledge, even if true, represents knowledge across the industry.

This scenario is analogous to that in *Connelly v. Gen. Motors Corp.*, 184 Ill. App. 3d 378, 391–92, 540 N.E.2d 370, 379 (1989). That court began by

explaining that evidence about not having heard of accidents is not even admissible unless the proponent shows the absence of claims occurred when the same product was used under conditions substantially similar to those present in the current case. In that case, the trial court refused to even consider the evidence.

On appeal, the *Connelly* court noted the defendant proffered testimony from the employee responsible for receiving product complaints who said he had never received a complaint regarding a tire blow out due to overloading. But the court noted that the defendant failed to provide evidence that the absence of complaints occurred when others were using the same product under conditions substantially similar to those present at the time of the accident at issue. The court also noted that the witness admitted he might be unaware of some blow outs. For example, he might not learn of a blow out if the owner went to a station for repairs without reporting it to the defendant. The same is true here where there is no reason to believe East heard of every fall and no reason to know whether such falls resulted in serious injury.

As part of its argument that the steps must be safe because it did not know of prior falls, East emphasizes that Gillespie had not fallen when using this trailer. Def. br. at 41. But East overlooks that he had had a couple of close calls with this very trailer. C1767 (45). In that vein, East's next point is ironically that the very danger it argues here *did not exist* was in fact *an obvious danger*. Def. br. at 41.

For those reasons, East's contention that it had not heard of prior falls is likely not even to be admitted at trial, and the evidence is in any event not dispositive.

IV. The open and obvious rule does not apply because the trailer is not a simple product. Even if the rule applied, it is only one factor in whether the steps were unreasonably dangerous and thus is not dispositive.

[Answer to Def. br. at 41-42.]

East contends the *Calles* case entitles it to summary judgment because the danger was obvious. Def. br. at 41, citing *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 864 N.E.2d 249 (2007). *Calles* held that the open and obvious nature of the danger at issue and the user's anticipated awareness of the dangers "inherent in the product" are two of many factors considered when applying the risk-utility test. But *Calles* carried out that analysis in the context of an argument that the open and obvious rule applied because the product was simple. The Court noted that the dangers associated with a product deemed simple are by their very nature open and obvious. *Id.* at 261.

Contrary to East's bid for summary judgment, the Court there held that the obviousness of the dangers of a product, simple or otherwise, does not itself obviate a manufacturer's duty. It is simply one factor to weigh in the risk-utility analysis. It rejected a *per se* rule even where the case involved a simple product with an open and obvious danger. *Id.* at 262-63.

Plaintiff also notes that this product is not simple. The concept of a fixed step might be simple, but the court undertaking a detailed analysis of

"simplicity" noted the focus has always been on the entire product rather than on just one part. *Miller v. Rinker Boat Co.*, Inc., 352 Ill. App. 3d 648, 665, 815 N.E.2d 1219, 1234 (2004). *Calles* later distinguished *Miller's* holding, but not its explanation of what constitutes a simple product. *Miller* looked at a sport boat as a whole, not just the deck. Here, if the Court believes simplicity is relevant, it should look at the trailer, not just the step. In addition, *Miller* found that viewing the entire product as a whole including its cost was more compatible with the economic rationale underlying the simple product rule. *Id.*

East adds that Plaintiff knew of the obvious danger of falling from a height. Def. br. at 41. But he of course did not know the design of the steps was deficient; that presented an independent danger unknown to him.

Finally, as with most of its points, this argument addresses only the steps, leaving the balance of the appellate decision based on other product deficiencies unaffected. The outcome would thus be the same regardless of the decision on this issue.

East adds two closely related arguments, contending Plaintiff could have avoided the danger by telling the loader to load less mulch and that he could have used the rear steps. Def. br. at 42.

As to the first, he instructed the loader to limit the volume of the load the next day as a personal accommodation because his pain from the fall prevented him from using the ladder. C1866(79). There is no evidence that he was empowered to decrease loads to less than capacity as a matter of course.

One assumes his employer would disagree. Further, East's argument ignores that the front-end loader dumps mulch onto the bows regardless of whether the trailer is loaded to its capacity, so there would be times when they would have to be cleaned regardless of whether the trailer was fully loaded.

As to using the rear steps, as explained earlier, Gillespie did not use them because of the great distance between the last step and the ground which he considered dangerous. C1782 (104-05), C1783 (107). Further, he had no reason to use the rear steps because he did not know the geometry of the front steps was deficient and he had no reason to avoid a danger of which he was not aware. And even if he had used the rear steps, he would have faced the same step unsafe geometry issues.

V. Plaintiff did not forfeit his consumer expectation claim.

[Answer to Def. br. at 43.]

Plaintiff also claimed that the trailer failed the consumer expectation test, a single-factor test. The jury in that situation is simply asked to determine whether the product is unsafe when put to a foreseeable use. Contrary to East's contention, a plaintiff is not required to adduce evidence of consumer expectation because jurors can rely on their own experiences to determine what an ordinary consumer would expect. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 554–56, 901 N.E.2d 329, 352 (2008).

East begins with a perfunctory two sentence paragraph claiming Plaintiff forfeited the consumer expectation test by not raising it in the trial

court. Def. br. at 43. However, Plaintiff specifically noted in his Response in the trial court that he could prove his claim under either of the two tests. C2061. He then listed all the ways this trailer did not perform safely as a consumer would expect. The core proofs were the same for both tests, with the alternative risk-utility test simply adding a number of factors.

In its Reply in Support of Its Motion, East did not distinguish between the two tests or take issue with Plaintiff's contention that there were two tests involved. C2991. And on appeal, its prior appellate counsel used a heading that specifically noted Plaintiff's contention that East owed a duty under both tests. Def. app. ct. br. at 26.

All that is compatible with the appellate court's recognition that both tests were at issue and its separate analysis of each test. *Gillespie, supra* at ¶¶ 41, 50. Even East's brief acknowledges the appellate court's conclusion that a user would expect the steps to be properly spaced. Def. S. Ct. br. at 43. Everyone including the appellate court understood that Plaintiff's claim rested on both tests.

VI. Evidence that East's trailer did not perform as a reasonable consumer would expect prevents summary judgment on any of the four charges.

[Answer to Def. br. at 43-45.]

East contends that as a matter of law, its trailer performed as expected. It first argues that the various regulations and standards that Plaintiff's expert offered as a basis for his opinion that the trailer was unsafe were inadmissible. That argument was addressed in the first point and will not be

repeated except to point out that it is only the admissibility of the expert's opinion that is critical here. Plaintiff does not need the regulations admitted into evidence to prevail.

In addition, Plaintiff notes his expert used the regulations only to address the safety of the step geometry and the rung-style ladder. Thus, even if East is correct on this point, the appellate decision stands because it rests on two alternative claims, the lack of a grab handle and East's failure to warn purchasers to install a grab handle.

East argues there is no evidence that users expect steps on this or any similar trailer to comply with the cited regulations and standards. Def. br. at 44. That is not the law. No case holds that a user like Dale Gillespie cannot recover under product liability tort law unless he or she first proves they specifically relied on a product's conformity with a specific regulation or standard when using the product. East cites nothing to support this contention.

In any event, its further argument shows that despite its claim that Gillespie had to prove he expected the steps to comply with regulations as a prerequisite to recovery, East understands that is not the law. It acknowledges that consumer expectation is based on an objective standard, e.g., the ordinary expectation of a reasonable person. Def. br. at 44, citing the appellate opinion at ¶ 51 which cited *Calles*, 224 Ill.2d at 256. It correctly recognizes the perspective is that of a user of a frameless dump trailer.

However, it then claims, without citation to authority, that the understanding of a "typical user * * * of a frameless aluminum dump trailer" is beyond the ken of jurors. In other words, East's position is that jurors cannot know what a trailer driver expects absent expert testimony. That issue is forfeited because East did not raise it earlier. In any event, to counsel's knowledge, no court has framed consumer expectation in that fashion. The reality is that Gillespie, like any consumer, simply expected the steps to be safe. Surely jurors can appreciate that expectation without expert assistance. *How* the steps were unsafe is another matter, one where the assistance of an expert might be beneficial. That of course is precisely what Plaintiff will offer through Mr. Hutter.

East then discusses what the purchaser expected about using the trailer, but the issue is only what Gillespie as the end user might reasonably expect. As to Gillespie, East says only that he testified there was nothing unusual about the steps. Def. br. at 45. First, that again stands in contradiction to their previous argument that Gillespie knew the steps were dangerous. The inconsistencies inherent in East's own arguments critically undercut its credibility.

In any event, someone like Gillespie looking at the steps would not appreciate that their geometry was not safe. Plaintiff's expert supplied that specific information. And even if he did appreciate some risk, that would not dispose of his claims. Someone who performs his or her job despite knowing of

some risk is protected. That is seen in the landowner liability cases where the open and obvious rule is primarily applied. Courts fashioned an except to the open and obvious rule where the possessor of the land had "reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *LaFever v. Kemlite Co., a Div. of Dyrotech Indus., Inc.*, 185 Ill. 2d 380, 391, 706 N.E.2d 441, 448 (1998).

Here, Gillespie had to climb to the top of the load to perform his job. He testified that his alternative was to stay home. C1767 (42). That more than satisfied *LaFever's* protections.

VII. East Manufacturing knew the purchaser would install a tarp cover and that the accompanying tarp cap would make the trailer unreasonably dangerous. Such a foreseeable modification does not insulate East from liability for its failure to make a safe product.

[Answer to Def. br. at 45-48.]

As described above, a tarp cap makes the trailer more dangerous because it covers the trailer's top edge, removing the driver's ability to grip that edge when climbing in and out. SUP C79 (123), C80 (129), C86 (153). A grab handle is needed to provide something to grip in place of the edge. East does not dispute that danger. But East argues it could not foresee that Trailer Quest would have Ken's Truck Repair add a tarp cover and tarp cap.

To the contrary, substantial evidence shows East was aware tarps are almost always installed. S. R. C78 (121). East admitted that in its appellate court brief. Def. app. ct. br. at 21 ("East was aware that some buyers would

install tarp covers … .”). It was common knowledge that trailer owners add covers, in part because various regulations require covers to avoid load spills. C2432 (67-68). East was aware both that its customers would order tarp covers from third parties (C2397 (67)) and that the tarp cap would cover the trailer’s top edge (C2398 (69)).

Where a post-sale change is thus foreseeable, liability is imposed on the manufacturer despite the change in the product’s condition after it leaves the manufacturer’s control. *Woods v. Graham Eng'g Corp.*, 183 Ill. App. 3d 337, 341, 539 N.E.2d 316, 318–19 (1989). A manufacturer may avoid liability for injury caused by an unforeseeable alteration by the user or a third party, but that principle does not control where the post-sale change is reasonably foreseeable. *Foster v. Devilbiss Co.*, 174 Ill. App. 3d 359, 364, 529 N.E.2d 581, 585 (1988) (manufacturer potentially liable where it was foreseeable that safety device would be removed by the user); *Davis v. Pak-Mor Mfg. Co.*, 284 Ill. App. 3d 214, 220, 672 N.E.2d 771, 775 (1996) (where a dangerous condition is caused by modification after leaving the manufacturer's control, the manufacturer is not liable unless the modification was foreseeable).

East cites authority for the proposition that it cannot be liable if it had “no way of knowing the ultimate user’s needs” (Def. br. at 46), but those cases are not apposite because the evidence shows it had such knowledge. East attempts to avoid the impact of the evidence of foreseeability by arguing that Plaintiff did not show a trailer operator would be capable of “making this sort

of modification", much less that it could do so easily. But the question was not whether the operator could perform work needed to make the modification but rather whether the purchaser would have someone do it.

To limit liability for foreseeable modifications to instances where the purchaser itself makes the modification, and exclude instances where the purchaser contracts with a third party to modify the product, surely makes no sense. Common sense as a guideline has not been abandoned. *Slager v. Commonwealth Edison Co., Inc.*, 230 Ill. App. 3d 894, 904, 595 N.E.2d 1097, 1103 (1992) (applying common sense when determining foreseeability); *Morris v. Union Pac. R. Co.*, 2015 IL App (5th) 140622, ¶ 69, 39 N.E.3d 1156, 1172 (juries instructed to use common sense). Indeed, the Court's instructions tell jurors to use common sense. IPI 1.01(4).

East relies on *DeArmond v. Hoover Ball & Bearing, Uniloy Div.*, 86 Ill. App. 3d 1066, 1070–71, 408 N.E.2d 771, 774 (1980), for its contention that it could not foresee that a purchaser might install a tarp cover. Def. br. at 47. But that is not what *DeArmond* is about. That court found no foreseeability where the doors to a machine could be removed only by first taking off eight quarter-inch bolts and a rod. And even if that constituted an easily removable safety device, the plaintiff had to show it was foreseeable to the manufacturer that the purchaser would remove the doors. The plaintiff there conceded the doors were removed without the manufacturer's knowledge. That is the opposite of the facts here. East knew the tarp cover would be added.

East adds an argument that it is "not required to anticipate every possible tarp system and tarp cover" that a customer might install. However, that is not what the appellate court held. East had only to anticipate foreseeable modifications and everyone agreed a tarp cover and cap fell in that category.

East closes this point with the contention it could not possibly have foreseen Trail Quest would add this tarp cover without at the same time adding a grab handle (the same grab handle East argues at 50 could not be installed) or a label warning drivers not to walk or stand on the tarp cap. Def. br. at 48. However, it cites no authority for that proposition, and none exists.

East is essentially arguing that even though it must anticipate a purchaser will modify the product in such a way as to create a dangerous condition, it can also assume the purchaser will at the same time take action to prevent the newly created danger. But if a manufacturer must anticipate a modification that creates a danger, why would that manufacturer reasonably believe the same purchaser would at the same time correct the dangerous condition it had just created. That is not logical. If a manufacturer could avoid liability for dangers created by foreseeable post-sale modifications where the purchaser did not also correct the danger created by its post-sale modification, the "foreseeable modification" basis for recovery would be meaningless.

VIII. The evidence supports Plaintiff's claim that East Manufacturing, knowing purchasers would add a tarp cover, should have warned purchasers to also install a grab handle.

[Answer to Def. br. at 48-51.]

Finally, East takes issue with the court's finding that because East knew Trail Quest would likely add the tarp cover and cap, it owed a duty to warn Trail Quest to also add a grab handle. As described above, a grab handle becomes essential because the cover removes the trailer edge as a point to grip. The court endorsed the validity of this claim after reviewing the evidence. *Gillespie, supra* at ¶ 61.

East's argument is premised on its earlier contention that it could not have known Trail Quest would have Ken's Truck add the tarp cover. But Plaintiff showed that contention failed, and this point consequently also fails.

East adds a backup argument, contending the warning sought by Plaintiff would not have been appropriate in any event, so that East's failure to require the purchaser to add a warning was excusable even if it had such a duty. Def. br. at 50. East reasons that even if warned, Ken's Truck (which installed the cover for Trail Quest) should not install a grab handle *on* the tarp cap. It points to testimony that the cap was not heavy enough to support a handle, at SUP C181. From that, East reasons a warning would not have changed the outcome with respect to the grab handle, an argument that does affect furnishing a warning to add a handle at the *top* of the steps.

This is yet another point where the relevant facts about where a handle could be installed were mentioned cursorily in the appellate briefs, e.g., East

app. ct. br. at 5, but were not really part of an issue there. Grab handles can be installed on two places, either on the top front of the trailer or on the trailer cap itself. East admitted that. Def. app. ct. br. at 5. Wells said East put its grab handles *on the front* as standard equipment if it installed a tarp cap. C2434 (76). Coffman said East put its handles *on the top* of the cap, on the cap itself. C2414 (134-35).

Whether a handle could be installed on the cap was disputed, as two witnesses disagreed with Coffman and East's statement in its brief that it could be placed there. Rohr said the cap was too thin to withstand the stress of a handle welded to it and also that it might create a problem with electrical lines. SUP 181 (100-02), SUP 187 (124-25). That disagreement simply created a question of fact.

The cap manufacturer did not recommend putting a grab handle on the cover, claiming it was too thin to stand on. SUP C112 (26-27). But Gillespie had performed this same maneuver countless times without damaging the cap, so the manufacturer's surmise was arguably wrong. Gillespie's ability to cross the cap without damaging it may have been because he actually did not stand or climb on it but rather got down on his hands and knees, distributing his weight. And the jury will also hear that East brought third party or cross claims against Ken's Truck, alleging that Ken's should have installed a grab handle "*on the tarp caps*." C351. Trail Quest made the same charge. C588.

Presumably East did not file that charge frivolously, and a jury hearing that admission could decide not to believe the testimony that it could not be done.

If all that were not enough to create a question of fact as to where a grab handle could be installed, East admitted in the appellate court that it "could have built this trailer * * * *with an aluminum end cap with a grab handle of the top of the aluminum end cap*." (Emphasis added.) Def. app. ct. br. at 5. Regardless of whether that is a judicial or an evidentiary admission, it stands as further evidence supporting Plaintiff's position.

As to the electrocution issue, that was forfeited because it was not raised in the appellate court. If the Court elects to consider this point, it will see it was raised in the deposition by a wonderfully leading question coming out of thin air with no foundation. The questioner suggested that adding objects to the front end of the trailer adds height to the front end when it is up in the air. S.C. 188 (126-27). Not surprisingly, given that his company has been sued by Plaintiff and others, that witness without explanation agreed, claiming concern about raising the trailer to its full height under a power line with a grab handle on the tarp cap.

But a grab handle on top of the cap would not, at full extension of the trailer, be the top edge. The highest point would have to be the front edge of the trailer, or the tarp cap to which the handle was affixed, because the handle would be perpendicular to that. Even East's expert could not say whether the handle would be the highest point. C2321 (127). And in any event, as East's

expert explained, no driver would raise the trailer under a power line where the trailer would be just inches from a power line. C2312 (90-92). Drivers would never do anything like that, for fear of arcing. At worst for Plaintiff, this is another question of fact.

East closes this point with a contention that it did not need to warn purchasers to install a grab handle because Gillespie knew the trailer would be safer with a grab handle. Def. br. at 51. However, the warning was not to run from East to Gillespie but rather from East to Trail Quest, so it does not matter what Gillespie knew. And Gillespie himself of course could not have added a handle, but if East had warned Trail Quest, it could have added the handle. The warning to add a grab handle was to go to purchasers, a warning that could change their conduct, not drivers.

Conclusion

For the reasons stated, Plaintiffs-Appellees Dale Gillespie and Christine Gillespie request that the decision of the appellate court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, I certify that this document conforms to the requirements of Rules 341(a) and (b). The length of this 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 14,903 words (including words in graphs).

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

DALE GILLESPIE and CHRISTINE GILLESPIE, *Plaintiffs-Appellees,*	)	
v.	)	
EAST MANUFACTURING CORP., *Defendant-Appellant,*	)	No. 125262
and	)	
ROBERT EDMIER, THOMAS EDMIER, and TRAIL QUEST, INC., *Defendants.*	)	

The undersigned, being first duly sworn, deposes and states that on July 15, 2020, there was electronically filed and served upon the Clerk of the above court the Brief of Appellees. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Michael W. Rathsack
Michael W. Rathsack

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 in this instrument are true and correct.

/s/ Michael W. Rathsack
Michael W. Rathsack