Docket No. 125262

IN THE ILLINOIS SUPREME COURT

DALE GILLESPIE and CHRISTINE GILLESPIE,

Plaintiffs-Appellees,

v.

EAST MANUFACTURING CORPORATION,

Defendant-Appellant,

and

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

Defendants.

On Appeal from the Illinois Appellate Court, First Judicial District, Docket No. 1-17-2349, there heard on appeal from the Circuit Court of Cook County, Law Division Court No. 13 L 8261, the Honorable John H. Ehrlich, Judge Presiding

BRIEF *AMICUS CURIAE* FOR THE ILLINOIS TRIAL LAWYERS ASSOCIATION

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POINTS AND AUTHORITIES

INTRODUCTION

This case involves a worker in the business of trucking who was engaged in an activity which was utterly foreseeable. After performing a work-related task in a dump trailer, he was simply trying to exit the trailer so that he could get into his vehicle and drive away. The steps were slippery. Worse still, there was no way for him to maintain three points of contact as he tried to exit the dump trailer. He fell from the trailer while doing nothing more than trying to do his job. For his efforts, he was seriously injured.

Many members of our organization have represented other people in similar situations. Those people are typically involved in trucking, but anyone working with a truck – including firefighters, waste haulers, and others – have been faced with similar difficulties. Trucks, fire engines, and other service vehicles are not built like automobiles. To access the working areas of those vehicles, people working with the vehicles must find a way to get up and down to enter and exit the vehicles. Doing so safely requires that the user maintain three points of contact during ascent or descent. However, job security and even job satisfaction frequently require employees to deal with the equipment with which they are provided. In this case, Mr. Gillespie, due either to a lack of appropriate steps or a grab handle, could not maintain three points of contact while getting out of the trailer. Predictably, without having those steps or a grab handle, he could not maintain three points of contact and fell, thereby sustaining a serious injury. It was the employee – Gillespie – who was then obliged to pay the price when he was injured as a consequence of a fall caused by equipment which was inappropriate for the work to which he was assigned.

The preceding raises a question: who all is responsible for work equipment where

the equipment is unreasonably dangerous when used in a foreseeable manner? The manufacturer in this case argues that it bears no responsibility for designing and manufacturing a vehicle which does not provide a safe method of ingress and egress for its trailer. We disagree.

We address three issues in this brief. First, OSHA rules and other similar rules from voluntary associations, none of which are legally binding on a manufacturer but which may be binding on the user or the purchaser, are legally relevant to the issue of whether that product is reasonably safe for its foreseeable uses. Second, in the absence of a rule or regulation, there was more than sufficient evidence submitted in Plaintiff's response to defeat Defendant's Motion for Summary Judgment in the lower court. Finally, Illinois public policy, as is set forth in decades of case law, holds that a manufacturer cannot delegate the issue of providing a reasonably safe product further down the stream of commerce to the purchasers or users of its products.

I. OSHA Rules and Rules from Voluntary Organizations, Which May Be Binding on the User or Purchaser of a Product but Not the Manufacturer, Are Legally Relevant to the Issue of Whether That Product Is Reasonably Safe for its Reasonably Foreseeable Uses.

This case is focused on an evidentiary issue: are OSHA and other regulations, many from voluntary organizations, relevant in a strict tort, product liability case? Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401; see *People v. Monroe*, 66 Ill.2d 317, 322, 5 Ill.Dec. 824, 362 N.E.2d 295 (1977) (adopting Fed. R. Evid. Rule 401); and *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 733 N.E.2d 1275, 1279 (Ill. 2000). Relevancy

is "tested in the light of logic, experience and accepted assumption as to human behavior." *Marut v. Costello*, 34 Ill.2d 125, at 128, 214 N.E.2d 768 (1965). However, relevancy exists only as a relation between an item of evidence and a matter properly provable in the case. *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 733 N.E.2d 1275, 1279 (Ill. 2000).

Material Issues and Fault. This Court has repeatedly pointed out that in a product liability case based upon strict liability, the concept of "fault" is not in play. "The key distinction between a negligence claim and a strict liability claim lies in the concept of fault." *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 864 N.E.2d 249, 264 - 65, 309 Ill.Dec. 383 (Ill. 2007). In a strict liability claim, the focus is on the condition of the product. *Id.* See also *Coney v. J.L.G. Industries, Inc.*, 97 Ill.2d 104, 117 - 18, 73 Ill.Dec. 337, 454 N.E.2d 197 (1983).

The difference is important. If the issue the trier of fact is looking to decide is whether a particular standard of care has been violated, the standard applied should be directed toward particular conduct. But that is not the situation in a strict tort, product liability case, where the issue is the safety of the product manufactured for use by people, here by people employed by the purchaser. Because the issue is the condition of the product and not the conduct of the manufacturer, standards related to product safety are relevant, even though they may not regulate the conduct of the manufacturer in designing or manufacturing the product in question.

Illinois has long held that to be the case. In *Pyatt v. Engel Equipment, Inc.*, 17 Ill.App.3d 1070, 309 N.E.2d 225, at 227 - 28 (Ill. App. 1974), the appellate court ruled that it was reversible error for the trial court to refuse to admit into evidence in a product

liability case a regulation from the Illinois Industrial Commission. The Court there specifically held that it was prejudicial error to exclude the source of the rule upon which the expert was relying, "since it would be of substantial relevance in evaluating a standard to know the source of the standard as distinguished from the opinion of a single expert." The Court stated further in *dicta* that the converse of that proposition, *i.e.,* that a product was in conformity with the Commission rules, would be equally relevant to a defendant manufacturer.

Introducing Standards or Rules, Generally. In order to prove that a particular product is unreasonably dangerous, can the plaintiff simply admit into evidence the relevant standard(s), without an expert relying upon that standard, and then let the trier of fact decide the issue? The short answer is "no." In Illinois, regulations or rules which have been adopted by ANSI, OSHA, or some other voluntary association cannot go into evidence as positive evidence without expert testimony. Supreme Court Rule 803(18) reserves the issue of allowing evidence such as learned treatises into evidence.

Expert Opinion. Plaintiff in this case produced an experienced expert in design engineering, Gary Hutter. In coming to the conclusion that the dump trailer was unreasonably dangerous, Mr. Hutter relied upon general engineering principles and four different groups of standards: OSHA, ANSI, FMCSR, and the Truck Trailer Manufacturers Association.

The appellate court below discussed the various standards discussed in its opinion. See Appellate Opinion, at ¶13. As *amicus,* we will not get into the minutiae of the various rules and regulations other than to note that the appellate court found these to be relevant. In its brief, the Defendant's arguments regarding these regulations – which

it says go to foundation – are more typically the subject of cross examination (weight) rather than foundation (admissibility). See, *e.g., Anderson v. Hyster Co.* (1979), 74 Ill.2d 364, 369 - 70, 385 N.E.2d 690 (no error in admitting conflicting expert testimony regarding applicability of certain standards to forklift trucks). To illustrate the preceding point, we note that at page 12 of its Brief, Defendant argues that the OSHA regulations in question post-dated the occurrence. But then, in the very next sentence, the Defendant admits that in his opinion, Mr. Hutter pointed to an earlier version of the OSHA regulation in effect at the time of the occurrence.

OSHA and Other Standards. As noted, Plaintiff's expert, Gary Hutter, relied upon a number of standards in concluding that the dump trailer was unreasonably dangerous. OSHA regulates employer conduct, but it also regulates equipment used by employees. ANSI is a private organization that oversees the development of voluntary consensus standards for products as well as other matters, like services and systems, in the United States.

There is a considerable overlap between OSHA and ANSI. The fact that OSHA is directed toward employer conduct *and* product safety can be seen by the source of many OSHA regulations. In addition to employer practices, OSHA regulates, specifically, the safety of equipment and tools being used by people working for their employers. Many ANSI standards were adopted by OSHA. See §1910.6 of the Occupational Safety Act. https://www.osha.gov/ laws-regs/regulations/standardnumber/1910/1910.6 An employer can be fined for its conduct in supplying employees with equipment which does not comply with OSHA regulations.

That a manufacturer cannot be fined or otherwise sanctioned for violating either

OSHA standards or ANSI standards does not preclude their admissibility on the issue of whether the product is unreasonably dangerous. Many years ago, this Court followed the rationale of the ruling in *Pyatt* and held that the "evidence of standards may be relevant and admissible even though the standards have not been imposed by statute or promulgated by a regulatory body and therefore do not have the force of law." *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 58, 506 N.E.2d 581, at 584 (Ill. 1987).

Defendant argues that Mr. Hutter should not be allowed to base his opinion on OSHA or ANSI regulations, citing *Schultz*. Brief, at 36. We respectfully submit that OSHA, ANSI and similar regulations are properly relied upon and used as a basis for Mr. Hutter's opinion and long have been for that purpose. There is a long line of cases on that point, beginning with *Pyatt* and continuing with opinions issued by this Court. See *Ruffiner v. Material Service Corp.,* 116 Ill.2d 53, 58, 506 N.E.2d 581, 584 (Ill. 1987) ("Evidence of standards promulgated by industry, trade, or regulatory groups or agencies may be * * * relevant in a product liability action in determining whether a condition is unreasonably dangerous." [Citing] *Moehle v. Chrysler Motors Corp.* (1982), 93 Ill.2d 299, 304-05, 66 Ill.Dec. 649, 443 N.E.2d 575; and *Rucker v. Norfolk & Western Ry. Co.* (1979), 77 Ill.2d 434, 438, 33 Ill.Dec. 145, 396 N.E.2d 534).

Citation to Standards as the Basis of Expert Opinion. The Defendant tells the Court that admission of the regulations "even for the limited purpose of explaining the basis of Hutter's opinion would be improper." In support, the Defendant in its brief, at 36, takes out of context a quote from *Schultz* ("[A]n expert's opinion is only as valid as the reasons that underlie it"). Here is the entire quote from *Schultz*, quoted by the Defendant, which supposedly stands for the proposition that allowing Gary Hutter to

testify to the regulations in question for the limited purpose of providing the support for his opinion would be "improper":

> In addition, an expert **must be allowed** to testify regarding the basis for his opinion [citations omitted] because an expert's opinion is only as valid as the reasons that underlie it (see *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill.App.3d 967, 974, 229 Ill.Dec. 65, 691 N.E.2d 1 (1997)). *Schultz v. Northeast Ill. Regional Commuter Railroad Corp.*, 775 N.E.2d 964, 987 - 88, 201 Ill.2d 260, 266 Ill.Dec. 892 (Ill. 2002) (citations in the ellipsis are omitted) (emphasis supplied).

The authority from *Aguilera v. Mount Sinai Hosp. Medical Center*, 691 N.E.2d 1, 293 Ill.App.3d 967, 229 Ill.Dec. 65 (Ill. App. 1997) cited above in the *Schultz* quote, was as follows:

> An expert may give an opinion without disclosing the facts underlying it. The burden then shifts to the adverse party on cross-examination to elicit the facts that underpin the expert's view. [Citations omitted.] An expert opinion is only as valid as the reasons for the opinion. **When there is no factual support for an expert's conclusions,** the conclusions alone do not create a question of fact. [Citation omitted.] *Aguilera v. Mount Sinai Hosp. Medical Center*, 691 N.E.2d 1, 293 Ill.App.3d 967, 229 Ill.Dec. 65 (Ill. App. 1997). (Emphasis supplied.)

We submit that an expert's citation to various standards is appropriate.

Appellate Court Jurisprudence. The Defendant, at 28 - 30 of its brief, analyzes two opinions which it says comprise the universe of jurisprudence regarding the admissibility of OSHA regulations in a product liability case, at least from the Appellate Court of Illinois. While that proposition might be technically true, we would ask the

Court to look further to our previously quoted passage from the Appellate Court of Illinois opinion in the *Pyatt* case, *supra*, at 4. Again, while it may be true that the regulations in *Pyatt* were not OSHA regulations, they were close to it. The regulations in *Pyatt* were standards set forth in the Health and Safety Rules adopted by the Industrial Commission pursuant to the authorization of the Health and Safety Act. (Ill.Rev.Stat.1971, ch. 48, par. 137.1 et seq.). The Court held in *Pyatt* that rather than confusing to the jury, admission of the regulations "would be of substantial relevance in evaluating a standard to know the source of the standard as distinguished from the opinion of a single expert."

But what to make of the fact that those rules were not binding upon the manufacturer? "Such rules do not and ought not have the force of a statute and we believe the standards contained in such rules may be the subject of dispute or refutation by either party." Was exclusion of the standards significant? "From what we have said, it also follows that we believe exclusion of the Health and Safety Rules as such was prejudicial and requires a new trial." *Pyatt v. Engel Equipment, Inc.*, 17 Ill.App.3d 1070, 309 N.E.2d 225, 227 - 28 (Ill. App. 1974).

The First District in *Turney v. Ford Motor Co.*, 94 Ill.App.3d 678, 418 N.E.2d 1079, at 1085 (Ill. App. 1981), cited and followed the Third District's decision in *Pyatt.* "[At the request of the defendant,] [e]vidence of OSHA standards was properly admitted in this case as a factor for the jury to consider in determining whether Ford manufactured a reasonably safe product."

Logical Relevance. The Defendant in our case submits that since an employer's conduct is *not* in issue, then OSHA regulations, geared toward the conduct of employers

in their use of a product, have no business being considered relevant in a strict tort, product liability case. The premise of the Defendant's point is that since the regulation in question governs the conduct of the employer rather than the conduct of the manufacturer, it is legally irrelevant. We submit that it is illogical to argue that since evidence would be relevant to a matter not at issue -- here, employer conduct -- then such evidence is irrelevant to any another matter which might also be at issue in the case.

In a strict tort, product liability case, the trier of fact is required to determine whether the product in question is unreasonably dangerous. But there is more. The trier of fact is asked to determine whether the product in question is unreasonably dangerous *when put to a use which is reasonably foreseeable.* IPI, Civil, 400.06 (2015).

The question then is whether evidence of an OSHA regulation which governs the employment use of a dump trailer like this has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In the context of this case, the question is whether the OSHA provisions tend to clarify whether the product is unreasonably dangerous *for its reasonably foreseeable uses.*

If the nature and function of the product are a part of the issue under consideration by the trier of fact, does it not follow that evidence of a regulation that applies to the conduct of people using the particular product – while in their employment -- is legally relevant? Would not such evidence provide the trier of fact with a better basis for determining whether the danger posed by a hazard in a product -- a product intended to be used by people doing the work that is part and parcel of operating a dump trailer -- is a hazard which should be found by them to be "unreasonable"? If employers

who allow employees to use this sort of product can be fined, should not that fact, *i.e.*, that the use of this particular product is proscribed by OSHA, not be a part of the body of evidence submitted to the trier fact for its consideration on the issue of "unreasonably dangerous"? Manufacturers certainly must pay attention to OSHA rules; otherwise their industrial products would not have a market.

In our case, the equipment in question, a dump trailer, was sold to an employer. What is at issue in the case is whether the dump trailer was reasonably safe for its reasonably foreseeable intended uses. OSHA applies to our situation because it provides the trier of fact with insight into whether it was reasonable to believe that this particular product was safe for its intended use in the workplace.

Labels Which Restrict the Foreseeable Uses. The product in this case is a dump trailer. It was certainly reasonably foreseeable that a dump trailer would be used by people while on the job, who were thereby subject to OSHA regulations. The Defendant cannot claim that it was surprised that this particular product was being used in an employer-employee relationship. This is not a case where the manufacturer was making a kitchen appliance which was marked, specifically, "for commercial use only" (see, e.g. https://www.amazon.com/LloydPans -10-Slice-Equalizer-Multi-Blade-commercial/dp/ B00C5PI1UE). Nor is it a case where the manufacturer designed exercise equipment and then marked that it was to be used for home or consumer use only (see, e.g., (https://www.marcypro.com/content/Product_Manuals/ Smith_Machines/SM-5870%20owners %20manual%204-30-19.pdf, at page 3).

Post-Sale Changes. The Defendant also could have anticipated users installing a tarp. The Defendant conceded as much in its Brief, at 48. We interrupt its statement, at

48, to make the following point.

> As [Defendant's employee] Grow explained, while he could anticipate that a purchaser might install a tarp and tarp cap ...

But if Gow admits that sort of anticipation -- that people would be installing a tarp and tarp cap -- how was the user of the trailer to be protected from the hazard posed of people accessing the trailer by way of the front rungs? According to the Defendant, again, at 48:

> When East puts a tarp cap on the front end of a trailer, it always installs a grab handle. (C2412, C2434.)

So if the Defendant "always installs a grab handle," then how was the user as well as any firm which was adding a tarp and tarp cap to the dump trailer know that adding a tarp required adding a grab handle -- or other protection from the risk posed of front access to a dump trailer? Gow's answer, at 48: he would "also anticipate that the people putting it on know what they're doing." (SupC79.)

So what about Mr. Gow's solution? If a manufacturer knows that putting a tarp and tarp cap on a dump trailer always requires the installation of a grab handle, why shouldn't the manufacturer be able to assume that the consumer or someone else downstream in the chain of distribution will figure out that there is a problem? Can a manufacturer assume that the people down the chain of distribution will figure out an appropriate solution to the problem – to "know what they're doing?" In response, we would ask where such firms would acquire the information that would allow them to "know what they're doing," to know that a grab handle was required. How would they figure that out? When all else fails, read the instructions? What instructions? What warnings?

There are problems with the approach recommended by Mr. Gow. First, the notion that the user should have known better ignores the nature of the duty owed by a manufacturer. That duty is one which cannot be delegated. *Doser v. Savage Mfg. and Sales, Inc.*, 568 N.E.2d 814, 142 Ill.2d 176, 187 - 88, 154 Ill.Dec. 593 (Ill. 1990). And the fact that this duty is one which is nondelegable is compounded by the legal principle that a manufacturer -- not the consumer -- is deemed to be an expert. "Manufacturers are charged with the knowledge of experts." *Anderson v. Hyster Co.,* 74 Ill.2d 364, 368, 24 Ill.Dec. 549, 385 N.E.2d 690 (1979).

Second, Mr. Gow's approach ignores what design engineers have long known: "The design engineer cannot assume the hazard posed by a mechanical mechanism will be obvious to the user, operator or observer of machine simply because it is obvious to its designer or a manufacturer." See the testimony of Carl Larson, a professor and former Associate Dean of the College of Engineering at the University of Illinois, quoted in *Dukes v. J.I. Case Co.*, 137 Ill.App.3d 562, at 572, 483 N.E.2d 1345, 91 Ill.Dec. 710 (Ill. App. 1985).

II. EVEN IN THE ABSENCE OF STANDARDS, THERE WAS STILL SUFFICIENT EVIDENCE TO PRESENT A QUESTION OF FACT TO THE TRIER OF FACT.

Summary Judgment, Generally. The persistent and insistent jurisprudence of this state is that disposition of a case by means of summary judgment is a drastic remedy.

> On appeal of an order granting summary judgment, a reviewing court must determine whether 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

> fact and that the moving party is entitled to a judgment as a matter of law.' 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to try an issue of fact but to determine whether one exists. 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.' Although summary judgment is encouraged in order to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. Consequently, a court must construe the evidence in the record strictly against the movant and should grant summary judgment only if the movant's right to a judgment is clear and free from doubt. *Id.* On appeal from an order granting summary judgment, a reviewing court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether summary judgment is proper as a matter of law.

Monson v. City of Danville, 2018 IL 122486, at ¶13, 115 N.E.3d 81, 425 Ill.Dec. 526 (Ill. 2018) (all citations omitted).

In our case, the Appellate Court examined all the evidence, construed the evidence, as it was required to, most favorably to the non-moving party, and then concluded that there was a question of fact to be decided by the trier of fact. The basis of the ruling went beyond an analysis of the standards relied upon by Mr. Hutter in rendering his opinions. Instead, the Court, after reviewing all of the evidence reviewed in a light most favorable to the Gillespies, at ¶48, concluded that a review of the testimony of five witnesses, along with the testimony of Mr. Hutter, including the standards he referenced, were sufficient to create a question of fact.

Standards Are Not Definitive. This Court long ago ruled that in product liability cases, although evidence of compliance with existing standards is relevant, it is

not conclusive. *Rucker v. Norfolk & W. Ry. Co.,* 77 Ill.2d 434, 440, 396 N.E.2d 534, 537 (Ill. 1979).

The analysis by this Court in *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 60 - 61, 506 N.E.2d 581, at 584 (Ill. 1987), provides a worthwhile look at how this should apply, even if the standards were found to be inapplicable:

> We conclude that the plaintiff failed to demonstrate the relevance of the ANSI standards to the pilot-house ladders on the Irving Crown, and therefore the admission of the standards into evidence was error. **The defendant contends that without the evidence of the ANSI standards, there was no basis for imposing liability here. We do not agree.** The plaintiff testified that he slipped as he was climbing up to the pilot house, and he described the ladder as slippery. There were no other witnesses to the accident; the first mate descended the ladders immediately after the plaintiff's fall, and he found them to be clean and free of any oil or grease. Although the plaintiff's expert relied heavily on the ANSI standards, which we have found to have been improperly admitted here, the basis for his opinion was directed at what he perceived to be the inadequate depth and width of the ladders, matters that could sustain a judgment for the plaintiff. We are unable to conclude that the evidence, when viewed in its aspect most favorable to the plaintiff, so overwhelmingly favored the defendant that no contrary verdict could ever stand. [Some citations omitted.] see also *Murphy v. Messerschmidt* (1977), 68 Ill.2d 79, 11 Ill.Dec. 553, 368 N.E.2d 1299 (**though plaintiff's evidence of standards was not shown to be relevant, and therefore was inadmissible, evidence did not warrant directed verdict in defendant's favor**).

Ruffiner v. Material Service Corp., 116 Ill.2d 53, 60 - 61, 506 N.E.2d 581, 106 Ill.Dec. 781 (Ill. 1987) (emphasis supplied).

The facts in *Murphy v. Messerschmidt* also included a fall down stairs. The Appellate Court ruled that a directed verdict should have been entered in favor of the Defendant. This Court agreed that the standards in the case should not have gone into evidence. However, the Court ordered a new trial. "[The appellate court] misapplied the proper standard [for directing a verdict]. It disregarded some of the plaintiff's circumstantial evidence and limited itself to defendant's direct evidence. It refused to consider the reasonable inference of negligence which could be drawn from findings which the court assumed for the purposes of its opinion, and erroneously made findings of fact which should have properly been made by the jury. *Murphy v. Messerschmidt*, 68 Ill.2d 79, 368 N.E.2d 1299, 11 Ill.Dec. 553 (Ill. 1977).

Lack of Standards Which Apply to a Dangerous Product. Many product liability cases brought by our members involve products which did not violate existing standards but were nevertheless unreasonably dangerous. For example, drones – flying objects with frequently unguarded propellers – are not subject to rules of the Consumer Product Safety Commission. Nor has the FAA issued rules as to drone safety. (https://advocacy.consumerreports.org/wp-content/uploads/2017/11/CU-letter-to-House-TI-aviation-panel-on-drone-safety-11-29-2017.pdf)

This is not particularly surprising. Appropriate standards might well serve to diminish the overall exposure to a hazard posed by dangerous products, but that is not to say that the hazards posed by all dangerous products are covered either by private standards or codes. For example, years ago, light trucks were driven on tube tires. When the industry switched over to tubeless tires, a hazard was created. The problem was that tubeless tires – meant to be placed only on tubeless rims (wheels) – were also able to be

placed onto rims meant for tube tires. On occasion, filling station workers or others who were working with light truck tires were provided, inadvertently, with tubeless tires to be mounted onto rims made for tube tires. The two were inherently incapable of matching perfectly. Worse still, when a tube tire was placed onto a tubeless rim, it fit just well enough to allow for it to hold an almost-unlimited amount of pressure while being inflated. Workers trying to "seat" the bead of the tire onto the rim would overinflate the tires, setting up a situation where the tire and rim would then violently explode. Notwithstanding the hazard created by switching to tube tires for light trucks, there were no standards on the books that were violated, private or public, because there were no standards which were in effect which addressed this hazard. Those standards were not issued until a number of workers had been hurt or killed and a number of lawsuits had been filed. See *Mazikoske v. Firestone Tire & Rubber Co.*, 500 N.E.2d 622, 149 Ill.App.3d 166, 102 Ill.Dec. 729 (1st Dist. 1986).[1]

In the case before the Court, we have the opinion evidence of Mr. Hutter. He is an expert in design engineering and human factors and has been for many years. C1288. We also have the testimony of other witnesses, reviewed in detail in the appellate court opinion, which testimony was before the trial court. Among other evidence, the Defendant itself acknowledged, at page 48 of its brief, that its employee, Grow, testified that he could anticipate that a purchaser might install a tarp and tarp cap, and that when the Defendant puts a tarp cap on the front end of a trailer, it always installs a grab handle.

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[1] There were a number of other cases tried in Illinois and elsewhere involving the identical hazard. *Mazikoske* was the first of at least 60 light truck-tire mismatch explosions of which we are aware. See, *e.g., Wheeler v. General Tire and Rubber Co.*, 142 Wis.2d 798 (Wis. App. 1987) (affirming plaintiff verdict in a similar mismatch case).

One inference from the foregoing is that the Defendant was counting on users and intermediaries to: 1) discern how to make the dump trailer safe; and 2) take whatever steps were necessary to do so. But the manufacturer's duty is one which is nondelegable. And there was no evidence that the manufacturer provided a warning or instructions regarding the need for a grab handle placed in a certain way in order to make a dump trailer reasonably safe for its intended use.

III. THERE ARE COMPELLING PUBLIC POLICY REASONS FOR NOT ALLOWING PRODUCT MANUFACTURERS TO ATTEMPT TO PASS ON RESPONSIBILITY FOR PRODUCT SAFETY TO PURCHASERS AND USERS, PARTICULARLY IN EMPLOYEE-INJURY CASES.

The Defendant, at page 48, allows that it always adds a grab handle to a dump trailer when it adds a tarp cap to the front end of a trailer. It also "could anticipate that a purchaser might install a tarp and tarp cap." (Defendant's Brief, at 48.) But as to how it would deal with the issue of safety when purchasers were installing a tarp and tarp cap on dump trailers? In other words, how to ensure that users were still provided with three points of contact during descent? Well, the purchasers – not the users, the purchasers – should "know what they're doing." (Id.)

Forty-five years ago, the Appellate Court of Illinois, First District, was faced with a case where a machine manufacturer sought to use evidence of OSHA regulations to shift the burden of providing a safe punch press to the employer. In *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill. App. 3d 971, 26 Ill.App. 971, 988, 326 N.E.2d 74, 85 (1st Dist. 1975), the court refused to allow such evidence, at least not for that reason:

> [A] manufacturer is under a nondelegable duty to produce a product which is reasonably safe, and a machine may be unreasonably dangerous for failure to

> incorporate safety devices. It therefore follows that a manufacturer cannot introduce evidence to show that the duty to incorporate the appropriate safety devices falls upon the purchaser of the product. **To allow such evidence in circumstances where the appropriate safety devices have not been provided to the purchaser, would inject into the case an improper conclusion of law so far as the issues of strict liability are concerned.** (The Court continued in a footnote that it was not ruling on whether such evidence was relevant on the issue of machine design, citing *Pyatt v. Engel Equipment, Inc.*, 17 Ill.App.3d 1070, 309 N.E.2d 225 (Ill. App. 1974).) (Citations omitted; emphasis supplied.)

Clients represented by our members have frequently faced the same dilemma. You're on the job, your family is counting on you to keep that job, you want to be looked at by your colleagues as someone who can get the job done, but you have tools which you know are less than safe. So now what? The best answer we heard was from a firefighter some years ago. He was using the same firetruck – a pumper truck used to carry water to the scene of a fire – which he had used for years. The pumper had no grab handles. As an engineer, his job after every run by his company was to climb on top of the pumper truck, open the water reservoir, and then check to ensure that the pumper's tank was full in time for the next run. If he did not do his job, the unit might arrive at the scene of a fire with little or no water in the tank. He was asked, "If you knew the pumper didn't have grab handles, why would you continue to use it after all those years?" His reply? "Counsel, you know how when you see a building on fire, and you see people running out of it? Well my job, when I see a building on fire, is to go in there and *deal* with it." That attitude, or variations on it, are heard not infrequently by our clients.

A grab handle – a device that cost approximately $100, according to the

testimony (Appellate Court opinion, at ¶11) – could have been placed on this dump trailer. If it had been, the occurrence would not have taken place. The Defendant *always* puts a grab handle on the trailers it knows will be configured as this one was. (Defendant's Brief, at 48.) The Defendant now seeks to have a shift in the law from a duty that is nondelegable to one that can be shifted to a purchaser, a user, or to an employer, contrary to decades of Illinois law.

Giving manufacturers a pass on their duty would have real-world consequences. Judge Richard Posner expressed a theory that economic actors will forego preventative measures when the cost of accidents, and therefore the cost of liability, is less than the cost of prevention. Hunt, at 919, citing Posner, R., "A Theory of Negligence," 1 *J. Legal. Stud.* 29, 33 (1972). This theory makes sense: If there is no penalty for ignoring safety considerations, why should a manufacturer bother making a product which is reasonably safe?

This Court recognized that principle in the context of product liability cases in deciding an unrelated issue in another product liability case, *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 260-261, 864 N.E.2d 249, 259 - 60 (Ill. 2007). In that opinion, this Court explained what the likely consequences would be if manufacturers, now charged with a nondelegable duty to manufacture a product which is reasonably safe for its intended use, no longer have to worry about such a duty:

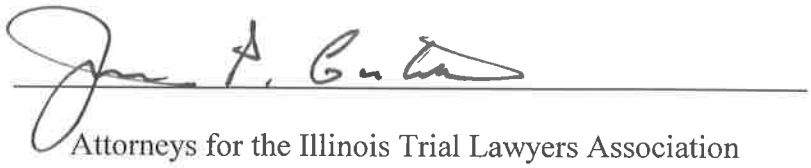
> Policy reasons also support rejection of a *per se* rule excepting simple products with open and obvious dangers from analysis under the risk-utility test. Adoption of such a rule would essentially absolve manufacturers from liability in certain situations even though there may be a reasonable and feasible alternative design

available that would make a product safer, but which the manufacturer declines to incorporate because it knows it will not be held liable. This would discourage product improvements that could easily and cost-effectively alleviate the dangers of a product. A per se rule would also frustrate the policy of preventing future harm which is at the heart of strict liability law. See 1 Madden & Owens on Product Liability § 8:3, at 447 (noting that the consumer-expectation test limited by the open and obvious doctrine 'perniciously rewards manufacturers for failing to adopt cost-effective measures to remedy obviously unnecessary dangers to human life and limb'); Restatement (Third) of Torts: Products Liability § 2, Comment a, at 16 (1998) (strict liability for design defects creates 'incentives for manufacturers to achieve optimal levels of safety in designing and marketing products"); Restatement (Third) of Torts: Products Liability § 2, Reporters' Note, Comment a, at 40 (1998) (strict liability 'promotes investment in product safety'). *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 260 - 61, 224 Ill.2d 247, 309 Ill.Dec. 383 (Ill. 2007).

CONCLUSION

We respectfully submit that the OSHA and other standards were appropriately considered, along with the testimony of plaintiff's engineer expert and other witnesses, by the Appellate Court, below, in concluding that there is a genuine question of fact in this case. For that reason, the reasons expressed above, and for the reasons submitted by Plaintiff's Counsel, we would ask this Honorable Court to affirm the ruling by the Appellate Court and to remand this case for a jury trial.

Respectfully submitted,



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Docket No. 125262

IN THE ILLINOIS SUPREME COURT

DALE GILLESPIE and CHRISTINE GILLESPIE,

Plaintiffs-Appellees,

v.

EAST MANUFACTURING CORPORATION,

Defendant-Appellant,

and

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

Defendants.

On Appeal from the Illinois Appellate Court, First Judicial District, Docket No. 1-17-2349, there heard on appeal from the Circuit Court of Cook County, Law Division Court No. 13 L 8261, the Honorable John H. Ehrlich, Judge Presiding

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) 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 21 pages.

Illinois Trial Lawyers Association

Signed and sworn to before me on the 15 day of July, 2020.

Matthew Kurnat
Notary Public

OFFICIAL SEAL
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