No. 125262

In the Supreme Court of Illinois

DALE GILLESPIE and CHRISTINE GILLESPIE,
Plaintiffs-Appellees,

v.

EAST MANUFACTURING CORPORATION,

Defendant-Appellant,

and

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

Defendants.

On Appeal from the First District Appellate Court, 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.

AMICUS CURIAE BRIEF OF ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT EAST MANUFACTURING CORPORATION

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

The Illinois Chamber of Commerce ("Chamber"), often referred to as the unifying voice of the business community in Illinois, is a statewide organization comprised of approximately 1800 members. These members represent a wide variety of business interests, including many businesses that manufacture a variety of products from trailers and other vehicular products to many kinds of machinery, tools, and other equipment that are modified, altered, customized, or finished by third parties after the product has left the manufacturer's control. In many instances, as here, the manufacturer's product is substantially altered by the installation of after-market products to meet the particular use to which the ultimate purchaser or end-user intends to put the product in its particular business.

Accordingly, the Chamber is deeply concerned by the appellate court's holding that East Manufacturing Corporation ("East") could be held liable for manufacturing and selling a trailer without a grab handle or warnings to protect against the manner in which a tarp cap was installed and used on East's trailer by an experienced trailer dealer (Ken's Truck Repair) and an experienced trailer hauler/operator (plaintiff's employer, Barge Terminal) after the trailer was sold and left East's control.

The Chamber's members include Illinois-based manufacturers who sell or distribute their products throughout the United States as well as out-of-state manufacturers, including East, who sell or distribute their products to Illinois dealers or Illinois consumers.

The Chamber zealously advocates on behalf of all its members who do business in the State of Illinois to achieve a competitive business environment that will enhance job creation, ensure job retention, and sustain economic growth. Thus, the Chamber believes it is uniquely situated to provide the Court with a business perspective regarding how affirmance of the appellate court's decision – allowing strict liability to be imposed on manufacturers for a third party's dangerous modification or alteration of the products they manufacture after the product has left their control – would be inimical to the competitive interests of all manufacturers who do business in the State of Illinois, with a disproportionate adverse impact on all Illinois-based manufacturers.

ARGUMENT

I. East Had No Duty To Anticipate That Plaintiff's Employer Would Allow A Tarp Cap To Be Installed On Its Trailer In A Manner That Would Create A Fall Danger For Its Employees That Did Not Exist When The Trailer Left East's Control.

The circuit court's summary judgment order in this case was based on the sound conclusion that where, as here, a manufacturer makes and delivers a safe product exactly as ordered by sophisticated and experienced customers, and plaintiff's accident resulted from the customers' alteration of the product with after-market equipment in a way that unnecessarily created a dangerous fall risk that did not exist at the time the product left the manufacturer's control, the manufacturer is not liable. (Sup R 241-45).

A. A Manufacturer Is Not Liable for a Defective Condition That Did Not Exist at the Time the Product Left Its Control.

The fundamental principle controlling this case is reflected in this Court's very first decision adopting the strict tort liability doctrine, *Suvada v. White Motor Co.* 32 Ill. 2d 612, 623 (1965), stating:

> The plaintiffs must prove that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one *and that the condition existed at the time it left the manufacture's control.* (emphasis added).

That principle has been reiterated in a progeny of Illinois strict tort liability cases since *Suvada*, and has often been applied to preclude a manufacturer's liability on facts analogous to the case at bar:

- "Where the intervention of a third party's defective alteration of the product is itself unreasonably dangerous and causes the injury, the original manufacturer is not liable." *Gasdiel v. Federal Press Co.*, 78 Ill. App. 3d 222, 227 (1st Dist. 1979) (summary judgment for manufacturer affirmed) citing *Rios v. Niagara Machine & Tool Works*, 59 Ill. 2d 79 (1974); *Augenstine v. Dico Co., Inc.*, 135 Ill. App. 3d 273, 275 (1st Dist. 1985) (summary judgment for manufacturer affirmed).

- "[A] manufacturer will not be held liable if the injury resulted from a dangerous condition created by the party who created the final product." *Woods v. Graham Engineering Corp.*, 183 Ill. App. 3d 337, 341 (2d Dist. 1989) (jury verdict against manufacturer reversed) (citation). Accord *Rotzoll v. Overhead Door Corp.*, 289 Ill. App. 3d 410, 416-17 (4th Dist. 1997) (Garman, J.).

B. The Danger That Caused Plaintiff's Accident Was Created by Third Parties after the Trailer Left East's Control.

The undisputed evidence established that the Genesis II Dump Trailer (trailer) at issue was manufactured and sold by East Manufacturing Corporation ("East") in a safe condition, and that plaintiff's accident occurred due to "a third party's defective alteration of the product," *Gasdiel*, 78 Ill. App. 3d at 227, and "a dangerous condition created by the part[ies] [Ken's Truck Repair and Barge Terminal] who created the final product." *Woods*, 183 Ill. App. 3d at 341. East manufactured and sold the trailer to

Ken's in a safe condition, exactly as it was ordered by Ken's. (C 1926-27). This included four corrugated cast aluminum steps welded to the front of the trailer. (C 2049, 2394) (Sup C 160). These front steps provided a safe 3-point-contact means of accessing the inside of the trailer, as the top edge of the trailer's bulkhead provided a secure handhold for anyone climbing up or down the steps. (C 2391, 2410, 2434-35) (Sup C 79).

Ken's in turn had ordered the trailer pursuant to the request of Robert Edmier, who ran Trail Quest, Inc. (the party that purchased the trailer from Ken's) and Barge Terminal, Inc. (the company that leased the trailer from Trail Quest, used it in its hauling business, and was plaintiff's employer). (C 1898, 1921-27). Edmier and Barge Terminal had decades of experience in the trailer hauling business. (C 1918). Barge Terminal hauled sand, stone, salt, dirt and other landscaping materials. (C 1917). Barge Terminal had purchased and operated numerous trailers over the years and had approximately 20 trailers in daily use at the time of plaintiff's accident. (C 1976).

Edmier inspected and approved the trailer, including the steps, after East delivered it to Ken's. (C 1927-29). Edmier then had Ken's install a tarp on the trailer. (C 1928). There are numerous tarp manufacturers, and the tarp system manufacturer chosen by Ken's (Shur-Co) makes more than

100 different models of tarps. (Sup C 113). Ultimately, the tarp system approved and purchased by Mr. Edmier on behalf of Barge Terminal and installed by Ken's required an aluminum tarp cap, with a wind screen, to be attached over the top edge of the trailer bulkhead, thereby preventing the bulkhead's top edge from serving as the safe third point of contact and handhold for anyone using the front steps to ingress or egress the trailer. (C 1935, 2050) (Sup C 112-15). The Shur-Co. tarp system came with a label warning not to walk or stand on the tarp cap, but Ken's did not place the label on the tarp cap installed on the trailer. (Sup C 114, 173).

With over 30 years of experience in the trailer hauling business, Mr. Edmier and his brother Tom Edmier were aware of the safety rule requiring that there be three points of contact for anyone needing to climb in or out of the trailer. (C 1935, 1946, 1948, 1953, 1984). Furthermore, Robert Edmier acknowledged that Barge Terminal could have alleviated the fall danger the tarp cap created by welding a grab handle on the trailer bulkhead to provide the necessary third point of contact for the driver or anyone else using the front steps to ingress or egress the trailer. (C 1932, 1935, 1938-41, 1952). Edmier said he preferred that the drivers use the rear steps, and had Ken's add steps inside the trailer for that purpose (Sup C 176) (C 1948), but he knew that they often still used the front steps. (C 1928, 1934).

Barge Terminal had experienced mechanics and a machine shop (C 1917-18, 1941) which could have installed a grab handle on the front bulkhead – as it had done on other trailers owned and/or operated by Barge Terminal (C 1857, 1891, 1931-33, 1945, 1952, 2660-62) and as plaintiff had repeatedly asked it to do (C 1941, 2628-29) – in little time (3 to 4 hours) with little expense (approximately $100). (C 1935, 1951). However, a grab handle was never installed prior to plaintiff's accident, and Barge Terminal allowed the trailer to be used by plaintiff without the third point of contact necessary to safely use the front steps – resulting in plaintiff's accident when his hand slipped off the tarp cap as he was climbing out of the trailer because there was nothing to grab. (C 2632). In plaintiff's words, "I didn't have my hands secured to anything (C 2633), and "there was nothing to hold onto." (C 2643).

C. The Appellate Court's Foreseeability Analysis Is Faulty and Would Create Open-Ended Strict Liability Exposure for All Manufacturers Whose Products Are Negligently and Dangerously Altered or Modified after They Leave the Manufacturer's Control.

As set forth above, the circuit court, consistent with the evidence and Illinois law set forth above, granted summary judgment to East on the ground that a defendant who manufactures a product that is safe when it leaves the manufacturer's control is not liable when, as here, the product is

subsequently "modified into an unsafe product by a third party." (Sup R 245). When it sold the truck to Ken's, East did not know who the ultimate user of the trailer would be or whether any tarp would be added, or whether the tarp system chosen would use a tarp cap. (C 2412, 2447) (Sup R 85-88) (Sup C 171-72). The appellate court nevertheless reversed, noting evidence that East still could foresee that some purchaser might install a tarp and a tarp cap in such a way that the tarp cap would cover the top of the trailer bulkhead, and thus could be liable for failing to install a grab handle before the trailer left its control. (A 16-18, ¶¶ 57-59). However, there was no evidence that East should have foreseen that Barge Terminal, an experienced trailer/hauler, would knowingly eliminate the required third point of contact with the tarp cap, and then not alleviate the danger by installing a grab handle at the top of the trailer bulkhead or providing some other means for safe ingress or egress on the front of the trailer. Indeed, on those rare occasions when East itself was asked to install a front tarp cap on a trailer, it always installed a grab handle to provide the required third point of contact that the tarp cap otherwise eliminated. (C 2412, 2434-35).

Even in the strict liability context, foreseeability means "that which it is *objectively reasonable* to expect, not merely what might conceivably occur." *Davis v. Pak-Mor Mfg. Co.*, 284 Ill. App. 3d 214, 220 (1st Dist.

1996), quoting *Winnett v. Winnett*, 57 Ill. 2d 7, 12-13 (1974). (emphasis in original). Here it was not "objectively reasonable to expect" that sophisticated and experienced entities like Ken's and Barge Terminal would knowingly install a tarp and tarp cap in such a way as to create a new danger by eliminating the known safety requirement of a 3-point-contact for anyone using the front steps, and then fail to remedy that newly created danger as it had the means to do.

As this Court has reiterated on numerous occasions, a defendant is not required to anticipate the negligence of another. *Dunn v. Baltimore & Ohio R Co.,* 127 Ill. 2d 350, 366 (1989); *Ward v. K Mart Corp,* 136 Ill. 2d 132, 152 (1990); *Hills v. Bridgeview Little League Ass'n*, 195 Ill 2d 210, 242-43 (2001). This same principle applies to a product defendant as well as any other defendant. *See Pommier v. Jungheinrich Lift Truck Corp.*, 2018 IL App (3d) 170116, ¶ 34, affirming summary judgment on behalf of product distributors and stating:

> It is conceivable that expert maintenance personnel or service companies like *Calumet* might negligently maintain a product or alter its functionality. However, the law does not deem manufacturers forever liable for such negligence beyond their control.

So here, Illinois law should not permit liability to be imposed on East because an experienced trailer dealer like Ken's and an experienced trailer

hauler like Barge Terminal modified the trailer by installing an after-market tarp system in such way as to eliminate the third point of contact for a driver to safely ingress and egress the trailer, and then knowingly failed to alleviate the danger that they had created.

Upholding the appellate court's foreseeability analysis on these facts would place an impossible duty on Illinois manufacturers of a myriad of different products – from trailers and other vehicle products to all kinds of machinery, tools and other equipment – to anticipate and design their products to account for all conceivable dangerous alterations or modifications of their product by a third party after the product had left the manufacturers' control. "Products liability does not make a manufacturer an insurer . . . ." *Hunt v. Blasius*, 74 Ill. 2d 203, 211 (1978). Yet the foreseeability required by the appellate court would expose all manufacturers doing business in Illinois to insurer-like liability for any subsequent dangerous modifications or alterations made to their products by third parties after the product had left the manufacturer's control. This is not and should not be Illinois law.

The appellate court cited *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382. However, in that case it was foreseeable to the manufacturer that the guard gate on its scissor lift would be removed because its presence

"hindered the use of the lift." *Id.* at ¶ 9. In contrast, the trailer as sold and delivered by East did not hinder safe ingress or egress into the trailer, but rather provided the top edge of the bulkhead as a necessary third point of contact to do so safely. It was only Ken's and Barge Terminal's subsequent decision to eliminate that third point of contact and not replace it with a grab handle or other contact point that hindered the safe use of the trailer and brought about plaintiff's accident.

D. The Appellate Court's Duty To Warn Holding Is Erroneous for an Additional Reason.

The same erroneous foreseeability analysis underpins the appellate court's holding that East could also be held liable for failing to warn consumers that a grab handle would be necessary if they installed a tarp cover on the front edge of the trailer bulkhead. (A 18-19, ¶¶ 61-64). The appellate court cited this Court's decision in *Sollami v. Eaton*, 201 Ill. 2d 1 (2002) (A 18, ¶ 62), but then failed to apply *Sollami's* clear holding that a duty to warn exists only in those instances of "unequal knowledge," *i.e.*, where the manufacturer has superior knowledge of the danger that the consumer does not have. *Id.* at 7. The undisputed evidence in this case establishes the opposite. It was the Edmiers and Barge Terminal who had superior knowledge of the danger that was created when Ken's installed a tarp cap in a manner that eliminated the safety-required third point of contact

for anyone using the front steps to ingress or egress the trailer. (C 1935, 1946, 1948, 1952, 1984). As a matter of law, East had no duty to warn Barge Terminal of a danger about which Barge Terminal was fully aware. *Id.* at 8.

E. The Expanded Strict Liability Approved by the Appellate Court Is Contrary to the Competitive Interests of All Manufacturers Who Do Business in the State of Illinois and Especially Harmful to Illinois-Based Manufacturers.

If the appellate court's decision is affirmed, all manufacturers doing business in the State of Illinois would face the daunting, if not impossible, task of designing, manufacturing, or labeling their products to account for all manner of dangerous modifications or alterations of their product after the product leaves their control, or be exposed to liability for injuries caused by those subsequent modifications or alterations. Such open-ended liability exposure would impact non-Illinois manufacturers (like East), who sell their products to Illinois dealers or Illinois consumers and would have to factor such liability exposure into the cost of the products they sell in Illinois, or consider whether to stop selling their products in Illinois. Neither result would be good for such manufacturers or their Illinois consumers. Moreover, such liability exposure would be particularly inimical to the competitive interests of Illinois-based manufacturers who would be subject to such expanded liability no matter where their products are sold or used,

and would therefore have to factor such liability exposure into the cost of all their products.

In short, the appellate court's foreseeability and duty to warn analysis is contrary to Illinois law, contrary to the competitive interests of all manufacturers doing business in the State of Illinois, and particularly contrary to the best interests of all Illinois-based manufacturers, their employees, and their consumers.

Conclusion

For all the reasons stated herein and in Defendant-Appellant's Brief, the Illinois Commerce Commission respectfully requests that this Court reverse the decision of the appellate court and affirm the order of the circuit court entering summary judgment in favor of East Manufacturing Corporation.

Respectfully submitted,

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Supreme Court Rule 341 (c) Certification of Compliance

Pursuant to Supreme Court Rule 341 (c), I certify that this Amicus Curiae's Brief conforms to the requirements of Rules 341 (a), (b) and Rule 345. The length of this brief, excluding the pages containing Rule 341 (d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

Respectfully submitted,

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NOTICE OF FILING and CERTIFICATE OF SERVICE

TO: See attached Service List

You are hereby notified that on June 10, 2020, we electronically filed with the Clerk of the Illinois Supreme Court, through eFileIL, **Amicus Curiae Brief of Illinois Chamber of Commerce in Support of Defendant-Appellant East Manufacturing Corporation, and Notice of Filing and Proof of Service,** true and correct copies of which are attached and hereby served upon you.

Respectfully submitted,
HALL PRANGLE & SCHOONVELD, LLC

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CERTIFICATE OF SERVICE

I, the undersigned, a non-attorney, certify that on this 10th day of June, 2020, true and correct copies of the attached **Amicus Curiae Brief of Illinois Chamber of Commerce in Support of Defendant-Appellant East Manufacturing Corporation, and Notice of Filing and Proof of Service,** were electronically filed and served eFileIL and e-mail to the attorneys of record on the below Service List.

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[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.