No. 129628

IN THE SUPREME COURT OF ILLINOIS

LAURA E. RICE, as Special Representative of the Estate of MARGARET L. RICE, deceased,

Plaintiff-Appellant,

v.

MARATHON PETROLEUM CORPORATION, a Delaware Corporation, SPEEDWAY, LLC., a Delaware Limited Liability Company, and MANOJ VALIATHARA,

Defendants-Appellees.

On Appeal from the
Appellate Court of Illinois, First District, No. 1-22-0155

There heard on appeal from the Circuit Court of Cook County, Illinois
No. 2018 L 000783
The Honorable James M. Varga, Judge Presiding

REPLY OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

This Court is asked to decide whether Plaintiff may bring a private cause of action for damages is available under the Illinois Environmental Protection Act ("IEPA") to a party who suffered physical injuries when the discharge of nearly 10,000 gallons of gasoline into the environment caused an explosion at her home. In answering this question, the Court must first determine whether the availability of such an action would help effectuate the purposes of the IEPA. See 415 ILCS 5/2(c) ("The terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act[.]").

The appellate court correctly observed that the statutory provisions at issue are "designed to not only protect the environment, but also to protect people and property from fire or explosion that could result from gasoline stored in or released from an underground storage tank." Modified Decision, ¶23. Defendants dispute this determination by urging an exceedingly narrow view of the purpose of the IEPA. In Defendants' view, the purpose of the IEPA is to protect "the environment first and foremost; the protection of citizens is incidental to that purpose." Defendants' Brief, p. 36. Defendants have this relationship exactly backwards. The protection of the health and safety of the citizens is the primary goal of the IEPA; the protection of the environment is the means through which those goals are achieved.

The very first finding articulated by the legislature when enacting the IEPA was that "environmental damage seriously endangers the public health and welfare." 415 ILCS 5/2(a)(i). The legislature additionally found that

> there exist continuing destruction and damage to the environment and harm to the public health, safety and welfare of the people of this State, and that among the most significant sources of this destruction, damage, and harm are the improper and unsafe transportation, treatment, storage, disposal, and dumping of hazardous wastes.

415 ILCS 5/2(a)(vi). These provisions make clear that environmental protections are necessary because "environmental damage seriously endangers the public health and welfare." 415 ILCS 5/2(a)(i). Protection of the public health, safety and welfare of the people is the primary purpose of the IEPA. It is not an incidental effect of efforts to protect "the environment" purely for the sake of protecting "the environment."

Would the availability of private actions under the IEPA further the Act's purposes of protecting "public health, safety and welfare" from the harms caused by damage to the environment and the "improper and unsafe transportation, treatment, storage, disposal, and dumping of hazardous wastes?" Undoubtedly so, but this Court does not need to speculate on this question. The legislature has clearly and unequivocally conveyed that it considers private remedies to be an integral component in the enforcement of the IEPA.

> [I]n order to alleviate the burden on enforcement agencies, to assure that all interests are given a full hearing, and to increase public participation in the task of protecting the environment, *private as well as governmental remedies must be provided.*

415 ILCS 5/2(v) (emphasis supplied). Elsewhere in the Preamble, the legislature reiterated this intent:

> It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program *supplemented by private remedies*, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.

415 ILCS 5/2(b) (emphasis supplied).

The IEPA's Preamble is a valuable tool in service of this Court's task "to ascertain and give effect to the true intent and meaning of the legislature." *In re Illinois Bell Switching*, 161 Ill.2d 233, 246 (1994). "An act's preamble has long been recognized as one of the quintessential sources of legislative intent." *Atkins v. Deere & Co.*, 177 Ill 2d 222, 232 (1997). It is this "quintessential source" of legislative intent through which this Court should view and interpret the remaining provisions of IEPA.

While courts have been mindful about the risk of encroaching on the legislature's prerogative by recognizing private causes of action too freely, no such concern is present in this matter. The legislature has itself directed that "private as well as governmental remedies must be provided" to enforce the IEPA and has explicitly directed courts to liberally construe the IEPA to achieve the goals of preventing harms to the public safety, health and welfare caused by environmental damage and destruction. In such circumstances, judicial respect for legislative prerogative is demonstrated by applying the IEPA broadly in a manner that most effectuates its purposes. Permitting private causes of action for injuries caused by violations of the IEPA would undoubtably further the IEPA's goal of preventing environmental damage and protecting the health and safety of Illinois residents.

I. THE IEPA IMPOSES STRICT LIABILITY ON THOSE WHO DISCHARGE HAZARDOUS SUBSTANCES INTO THE ENVIRONMENT

Defendants deny that the IEPA imposes strict liability for the release of hazardous substances into the environment, relying on *Phillips Petroleum Co. v. Illinois Environmental Protection Agency*, 72 Ill.App.3d 217, 220 (1979) ("We have found no case which imposes strict liability on an alleged polluter.") Defendants' Brief, p. 27. However, this decision predates Illinois' 1983 adoption of the liability standards of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607. See *People v. N.L. Industries*, 152 Ill. 2d 82, 92 (1992) ("In December 1983, Illinois amended the Act to reflect the changes in environmental regulation made by CERCLA."). "CERCLA is a strict liability statute. Liability is imposed when a party is found to have a statutorily defined 'connection' with the facility; that connection makes the party responsible regardless of causation." *U.S. v. Capital Tax Corp.*, 545 F.3d 525, 530 (7th Cir. 2008). "The liability under [CERCLA] is strict liability and joint and several liability; innocence of the defendant is irrelevant." *City of Gary, Indiana v. Shafer*, 683 F. Supp. 2d 836, 852 (N.D. Ind. 2010).

Illinois' adoption of CERCLA strict liability standards is codified in the IEPA at Section 22.2(f). 415 ILCS 5/22.2(f). Illinois courts have recognized that Section 22.2(f) is a strict liability statute. *CILCO v. Home Insurance Company*, 213 Ill. 2d 141, 166 (2004) ("[Section 22.2(f) of] the Act imposes strict liability for this type of contamination."). LUST in turn adopts the liability standards

of Section 22.2(f) through Section 5/57.12(g). 415 ILCS 5/57.12(g) ("The standard of liability under this Section is the standard of liability under Section 22.2(f) of this Act.")

Defendants do not deny that Illinois has adopted CERCLA's liability standards or that CERCLA imposes strict liability. In fact, not a single mention of CERCLA appears in Defendants' Brief. Defendants acknowledge that LUST has adopted the liability standards of Section 22.2(f) but deny that Section 22.2(f) is a strict liability statute, without citation to any authority and without contending with any of Plaintiff's cited authority to the contrary. Defendants' Brief, p. 26. Defendants' mere assertion that Section 22.2(f) "does not contain any express language supporting Plaintiff's contention that a strict liability standard applies" is insufficient to raise any real question on this point, especially where this Court has already held that Section 22.2(f) imposes strict liability. *CILCO v. Home Ins. Co.*, 213 Ill. 2d at 166.

In cases decided after the enactment of CERCLA liability standards, "the analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution." *People v. Fiorini*, 143 Ill. 2d 318, 335 (1991). A plaintiff must show only that "the alleged polluter had the capability of controlling the pollution or at least had control of the premises where the pollution occurred." *People ex rel. Madigan v. Lincoln, Ltd.*, 2016 IL App (1st) 143487, P. 24. "[K]nowledge, awareness, or intent are not elements of a

violation of the Act." *Id.* The only defenses available under CERCLA and Section 22.2(f) are that "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party . . . or (4) any combination of the foregoing paragraphs." 42 U.S.C. § 9607(b); 415 ILCS 5/22.2(j)(1). All three provisions – CERCLA, Section 22.2(f) and LUST Section 57.12 (g) – impose the same strict liability standards on those who release hazardous materials into the environment.

II. THE IEPA PERMITS PRIVATE ACTIONS BY PARTIES INJURED BY LEAKING UNDERGROUND STORAGE TANKS

Plaintiff reasserts her contention that the relevant statutory provisions are sufficient to constitute an express private right of action and rely on the argument made in her Brief on this point. However, should this Court disagree, Illinois courts have employed two different means of permitting a private cause of action for injuries caused by a statutory violation where one is not expressly provided for in the statute. The first arises out of the line of cases beginning with *Boyer v. A.T. S.F. Ry. Co.*, 38 Ill. 2d 31 (1967). Those cases hold that a private cause of action is available for injuries caused by violation of a statute aimed at "protecting a certain class of persons against their own inability to protect themselves" where the violation "causes injury to a member of that protected class." *Magna Trust Company* 313 Ill. App. 3d at 384.

The second method of determining whether a cause of action is available is to apply the test articulated in *Fisher v. Lexington Health Care, Inc.*, 188 Ill.

2d 455 (1999).[1] Under *Fisher,* a private right of action will be implied where "(1) the plaintiff is a member of the class for whose benefit the statute was enacted, (2) the plaintiff's injury is one the statute was designed to prevent, (3) a private right of action is consistent with the underlying purpose of the statute, and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute." *Fisher,* 188 Ill.2d at 460.

These two tests overlap considerably. However, where the *Fisher* test is aimed at determining whether the legislature intended to confer a private right of action by implication, the *Boyer* test focuses more on the harm the statute seeks to prevent and permits a private right of action even where no such right is expressed or implied in the statute. Much of Defendants' Brief is directed toward arguing that the IEPA does not contain an express or implied private right of action under the four-part *Fisher* test. However, Defendants do not address the threshold question of whether the *Fisher* test applies where, as here, the statute imposes strict liability. Plaintiff has discovered no cases where an Illinois court has applied the *Fisher* test to a strict liability statute. As Plaintiff has previously noted, it is unclear whether the *Boyer* framework remains the appropriate method of analyzing strict liability statutes or whether *Boyer* is superseded by the test later articulated in *Fisher*. However,

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1. This Court has also referred to this test as the *Metzger* test, following *Metzger v. DaRosa*, 209 Ill.2d 30 (2004). See *Channon v. Westward Mgmt.*, 2022 IL 128040, 2 (Ill. 2022). The two tests are functionally identical. For the sake of continuity, Plaintiff will continue to refer to the *Fisher* test.

a private right of action is available to Plaintiff in this case under both the *Boyer* and *Fisher* tests.

A. *BOYER* DOES NOT REQUIRE A FINDING OF EITHER AN EXPRESS OR AN IMPLIED RIGHT

Under *Boyer*, violation of a statute that imposes strict liability gives rise to a private strict liability cause of action for injuries caused by such a violation, even where the statute does not include an express or implied right of action. The defendant in *Boyer* argued that

> a violation of the Federal Safety Appliance Act calls only for criminal penalties and that a violation of the Act does not in itself create a cause of action. Hence, the defendant says, since the plaintiff has not alleged any negligence on the part of the defendant but only a violation of the Act, he has not stated a cause of action.

Boyer, 38 Ill. 2d at 34. The *Boyer* court rejected this argument and held that "all that is necessary for a plaintiff to base his cause of action on a breach of this statute is that it appear that he was within the class of persons the statute intended to protect and that the injury was the type of risk covered." *Boyer,* 38 Ill. 2d at 37. The Boyer court further held that, because the Act imposed strict liability "it is apparent that a breach of the Safety Appliance Act does give rise to a civil cause of action which is separate from any cause of action based on negligence and that absolute liability for such breach is imposed on the violator." *Boyer,* 38 Ill. 2d at 35-36.

Applying *Boyer*, the court *in Magna Trust Company v. Illinois Central Railroad* acknowledged that the Safety Appliance Act "creates neither an

express nor an implied cause of action for non-employees." *Magna Trust Company v. Illinois Central Railroad*, 313 Ill. App. 3d 375, 381 (5th Dist. 2000). However, because the Federal Employers' Liability Act (FELA) imposed strict liability in actions brought by railroad employees, the court held that "we can conceive of no reason to protect a railroad employee but to ignore a nonemployee, such as Rusty Jones, who is injured as a result of exposure to the same risks." *Magna Trust* 313 Ill. App. 3d at 385. The *Boyer* court similarly held that "to limit the protection of the Act to railroad employees or those acting as employees, as the defendant urges, would be improperly restrictive and contrary to the congressional intent" because "the Act was intended to secure the safe operation of interstate trains by railroads. We have no doubt that passengers were certainly intended to be within the class to be protected under the Act." *Boyer,* 38 Ill. 2d at 37-38.

Defendants here argue that "the strict liability purportedly contemplated in the IEPA has no application to claims by private parties." Defendants' Brief, p. 27. However, this argument was considered and rejected in *Boyer* and *Magna Trust*. In those cases, the strict liability standard applied explicitly only to criminal prosecutions and in civil actions brought by railroad employees. Those cases held that the available causes of action under a statute aimed at "protecting a certain class of persons against their own inability to protect themselves" can be expanded to "impose absolute liability for a

violation that causes injury to a member of that protected class." *Magna Trust Company* 313 Ill. App. 3d at 384.

The present case is similar to *Magna Trust* and *Boyer* in all material respects. The relevant provisions of the IEPA are designed to protect the health and safety of the public from the improper storage, transportation and disposal of hazardous materials. The IEPA imposes strict liability on those who control such materials, regardless of fault. Under the rule articulated in *Magna Trust* and *Boyer,* this Court need not determine whether the IEPA includes an express or implied private right of action for any particular class of plaintiffs. So long as a statute imposes strict liability in some contexts, any party that falls within the class of people that the statute was designed to protect may bring an action in strict liability for damages where a violation of the IEPA causes an injury that the statute was designed to prevent. Plaintiff in this case falls within the class of people the statutes are designed to protect and was injured due to a violation of a statute that imposes strict liability on offenders. She therefore is entitled under *Boyer* to seek remedies through a private cause of action based on the violation of the IEPA.

B. PLAINTIFF SATISFIES THE *FISHER* TEST

Under *Fisher,* a private right of action will be implied where "(1) the plaintiff is a member of the class for whose benefit the statute was enacted, (2) the plaintiff's injury is one the statute was designed to prevent, (3) a private right of action is consistent with the underlying purpose of the statute, and (4)

implying a private right of action is necessary to provide an adequate remedy for violations of the statute." *Fisher* 188 Ill.2d at 460.

The appellate court determined that Plaintiff satisfied the first three parts of the *Fisher* test. The appellate court correctly observed that the statutory scheme is "designed to not only protect the environment, but also to protect people and property from fire or explosion that could result from gasoline stored in or released from an underground storage tank." Modified Decision, ¶23. As discussed above, Defendants dispute this determination by urging an exceedingly narrow view of the purpose of the IEPA, but it is clear that the IEPA is directed broadly toward protecting the health, safety and welfare of Illinois residents through environmental regulations. See *People v. Valdivia*, 2011 IL App (2d) 100998, ¶22 (holding that the IEPA reflected "the legislature's intent to prevent personal injury or property damage, specifically to prevent injury to persons and harm to the environment from hazardous substances.") As a member of the public whose health, safety and welfare were injured by the release of gasoline from Defendants' UST, Plaintiff satisfies the first three parts of the *Fisher* test.

Defendants suggest that *NBD Bank v. Kruger Ringier, Inc.*, 292 Ill. App. 3d 691 (1st Dist. 1997), is relevant to this matter. Defendants' Brief, p. 29. *NBD Bank* involved a tort claim under the IEPA by a purchaser of contaminated real estate. After distinguishing between a recovery in tort for personal injury and property damages and the economic losses recoverable as contract

damages, the NBD Bank court held that the *Moorman* doctrine barred the plaintiff's recovery in tort because the damages sought by the plaintiff – expenses incurred in remediating damage to the property – "unmistakably constituted economic losses." *NBD Bank* 292 Ill. App. 3d at 696. In addressing whether public policy considerations alone supported a private cause of action, the court noted that:

> The Illinois Environmental Protection Act and companion regulations were not designed to protect the purchasers of real estate who discover after the conveyance that remedial action is necessary to remove contaminants from the property, nor was the Act designed to protect against economic losses resulting from the obligation to remove contaminants.

NBD Bank at 697. The Court further noted that such claims would conflict with the public policy supporting the free and unhindered sale of real estate because such goals "would be severely undermined if vendors were to be held liable in tort for economic losses resulting after they sold their interest to another party." Id. at 698. "Under these facts," the court concluded "we hold that a private right of action under the IEPA does not exist, and the public concerns which governed the decisions in *Brockman* and *Fiorini* are not present here." *NBD Bank*, 292 Ill. App. 3d at 698.

The holding of *NBD Bank* is not relevant to the present matter. First, Plaintiff does not seek compensation for purely economic losses, so the *Moorman* doctrine is not implicated. Even if Plaintiff's damages were purely economic, one exception to the *Moorman* doctrine, applicable in this case, is "where the plaintiff sustained damage, i.e., personal injury or property

damage, resulting from a sudden or dangerous occurrence." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 199 (1997). An explosion caused by gasoline released into the environment would certainly trigger that exception.

Second, NBD Bank's holding that the IEPA was not designed to protect purchasers of contaminated real estate is very narrow. Plaintiff in this case is not a purchaser of contaminated real estate; she is an individual who was gravely injured due to Defendants' release of a hazardous substance into the environment, which is a result the IEPA was certainly designed to prevent. Third, unlike in *NBD Bank,* there are no countervailing public policy interest at stake in this case. There is no public policy interest in permitting discharge of hazardous materials into the environment or in encouraging owners and operators to be lax in maintaining the safety of underground storage tanks.

NBD Bank held only that a private right of action does not exist under the IEPA to recoup purely economic losses incurred by subsequent purchasers of real property. The present case involves a different class of plaintiff, a different category of injuries, and different public policy concerns. *NBD Bank* does not address the issues before the Court and is neither binding nor persuasive authority in this matter.

In discussing the fourth *Fisher* factor, Defendants first argue that a private right of action for damages is unnecessary because State enforcement is adequate to remedy violations of the IEPA. Defendants' Brief, pp. 20-21. Defendants note that the State did in fact pursue an action against them and

that the State obtained certain relief "including payment of a monetary penalty, taking corrective action, environmental remediation, and further monitoring of the soil and groundwater." Defendants' Brief, p. 21.

State enforcement proceedings are merely one means of furthering the purposes of the IEPA, but they are inadequate here for two reasons. First, state enforcement proceedings cannot compensate third parties for their injuries. The relief obtained by the State does nothing to remedy the specific, particularized injuries to Plaintiff that are at issue in the present action. When interpreting other statutes, this Court has held on numerous occasions that the availability of state enforcement mechanisms does not preclude private actions for specific harm. In *Corgan v. Muehling*, this Court acknowledged that the Psychologist Registration Act only explicitly vested enforcement powers in state officials, but also held that State enforcement alone was inadequate to compensate individuals who were injured by violations of the Act. *Corgan v. Muehling*, 143 Ill. 2d 296, 314, 315 (1991) ("A private right of action under the Psychologist Registration Act is the only way that an aggrieved plaintiff can be made whole when a defendant fails to comply with the provisions of the Act.") Similarly, this Court permitted a private right of action for violation of the X-Ray Retention Act because "administrative remedies would not provide an adequate remedy to those injured by violations of the Act." *Rodgers v. St. Mary's Hospital*, 149 Ill. 2d 302, 309 (1992). The enforcement actions

taken by the State in this case are warranted but they do not address or remedy Plaintiff's injuries.

Second, state agencies are incapable of monitoring and acting on every violation, even where a violation adversely impacts a third party. The legislature itself recognized these limitations when it directed that private remedies should be provided "in order to alleviate the burden on enforcement agencies, to assure that all interests are given a full hearing, and to increase public participation in the task of protecting the environment." 415 ILCS 5/2(v). This Court has previously acknowledged the important, complimentary role that private actions for damages play in enforcing a regulatory scheme. See *Rodgers v. St. Mary's Hospital*, 149 Ill. 2d at 309 ("Additionally, the threat of liability is a much more efficient method of enforcing the regulation than requiring the Public Health Department to hire inspectors to monitor the compliance of hospitals with the provisions of the Act.") A private action for damages caused by a violation of the IEPA both encourages compliance with the IEPA and ensures that "adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b).

Defendants next argue that a private right of action is unnecessary because a common law negligence action is sufficient to allow a plaintiff to seek damages for injuries caused by discharges from USTs. This argument is entirely premised on Defendants' assertion that the IEPA does not impose strict liability on UST owners and operators. Plaintiffs' brief contains extensive

argumentation regarding the insufficiency of a common law negligence action as a reasonable substitute for a strict liability action. Defendants do not dispute this point. They merely deny that the IEPA imposes strict liability on violators, which is an argument that Plaintiff addressed above.

Defendants' additional arguments against the availability of a private action under the statute are unpersuasive or simply wrong. For example, Defendants argue that "the indemnification sections Plaintiff relies on do not reference 'bodily injury' whatsoever, nor do they articulate an intent that a citizen is compensated for any injury resulting from the release of petroleum." Defendants' Brief, p. 31. However, "indemnification" is defined in the statute as, in full:

> "Indemnification" means indemnification of an owner or operator for the amount of any judgment entered against the owner or operator in a court of law, for the amount of any final order or determination made against the owner or operator by an agency of State government or any subdivision thereof, or for the amount of any settlement entered into by the owner or operator, if the judgment, order, determination, or settlement **arises out of bodily injury or property damage suffered as a result of a release of petroleum from an underground storage tank owned or operated by the owner or operator.**

415 ILCS 5/57.2 (emphasis added). Obviously, "bodily injury" is in fact referenced in the statute. Equally clear is that the statute anticipates that liability arising from bodily injury may be imposed "in a court of law."

Defendants reject the suggestion that LUST's indemnification provisions are aimed at ensuring that those injured by leaking USTs are compensated for their injuries. Instead, they assert that "this provision of

LUST merely ensures that those responsible for underground storage tanks are held accountable, while also providing a means of financial relief when they face claims or judgments due to environmental damage caused by their tanks." Defendants' Brief, p. 32. This is a puzzling interpretation of LUST's indemnification program. First, indemnifying UST owners and operators against adverse judgments does not hold them accountable; it does the opposite. It ensures that they will not bear the cost for bodily injuries and property damage caused by a release from the USTs.

Stranger still, if Defendants are correct that the IEPA does not impose strict liability and that UST owners and operators can be held liable *only* for negligence, then the IEPA imposes *less* accountability on UST owners and operators for bodily injuries or property damage than they otherwise would have faced under the common law. If Defendants' interpretation is to be credited, the legislature would have enacted a comprehensive regulatory and enforcement scheme to ensure the safe underground storage of petroleum products, but then effectively removed any incentive for UST owners and operators to act with due care by indemnifying them against liability to both the State government and a private party who was injured due to the owner or operator's negligent conduct.

If Defendants' interpretations are correct, the indemnification provisions only make accidents and injuries more likely because they shield a defendant from the consequences of his own negligence. In light of the goals

and function of the rest of the IEPA, it is highly unlikely that the legislature would choose such a course. A far more plausible reading of the statute is that UST owners and operators are understood to be strictly liable for "bodily injury or property damage" resulting from a release from a UST, and that the indemnification program is intended to both mitigate the burdens on UST owners and operators who may be held liable for damages even where they acted with due care, and to help ensure that injured parties are compensated. Defendants own passive formulation of the function of the indemnification program – as protecting against judgements for injuries "caused by their *tanks*" rather than "caused by their *actions*" – suggests an understanding that a defendant need not be at fault to incur liability. The existence of the indemnification program strongly indicates that the legislature expected a private cause of action in strict liability to be available to parties injured due to a release from a UST, regardless of the fault of the owner or operator.

For the reasons discussed in depth in Plaintiffs' Brief, a common law negligence action cannot adequately provide a remedy for a violation of a strict liability statute. Once a statute imposes strict liability on an offender, "violation of the act is itself an actionable wrong and is in no way dependent upon negligence. The duty is absolute and the [defendant] is not excused by showing proof of due care." *Magna Trust*, 313 Ill. App. 3d at 384.Where the legislature imposes strict liability, an action in negligence forces a plaintiff to prove more than is required, affords a defendant more defenses than are

properly available, and falls far short of achieving the high degree of responsibility placed on a strict liability defendant.

III. THIS COURT MAY DECIDE THE AVAILABILITY OF PUNITIVE DAMAGES FOR ACTIONS BROUGHT UNDER THE IEPA

Defendants assert that "this Court has no jurisdiction to entertain Plaintiff's argument" regarding the availability of punitive damages because "Plaintiff's Motion for Punitive Damages was never ruled on by the circuit court, and so there is no final, appealable order." Defendants' Brief, p.38. While the circuit court did not rule on the specific issue of punitive damages, Illinois Supreme Court Rule 366 permits the Court, in its discretion, to decide a question of law for the first time on appeal. *Gatto v. Walgreen Drug Co.*, 61 Ill. 2d 513, 520 (1975) ("In many instances this court, acting under Rule 366, has decided issues that had not been presented to or decided by the court whose decision is being reviewed.") Also see *State Farm Mut. Auto. Ins. Co. v. McFadden*, 2012 Ill. App. 2d 120272, ¶10 (2nd Dist. 2012) ("This court may address questions of law presented to, but not decided by, the trial court.")

If this Court determines that Plaintiff may proceed with her claims under the IEPA, one of the issues that will inevitably arise is whether she may seek punitive damages. Plaintiff has cited to the factors listed in 415 ILCS 5/42(h) in support of her argument that the legislature has determined that traditional punitive damages considerations such as punishment and deterrence were necessary mechanisms for enforcement of the IEPA. When imposing civil penalties under Section 42(h), courts have explicitly highlighted

"the dual purpose of the imposition of penalties, which is to punish violators and discourage other similarly situated parties from engaging in prohibited conduct." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2013 Ill. App. (1st) 113498, ¶74 (affirmed in part, reversed in part, on unrelated grounds, 2015 Ill. 117193, (2015)). Similarly, in *People ex. rel. Ryan v. McHenry Shores Water Co.*, 295 Ill. App. 3d 628, (2d Dist. 1998) the court approvingly noted that the trial court "particularly emphasized the fourth [42(h)] factor, concerning the need to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with the Act by the violator and others." *People ex rel. Ryan* 295 Ill. App. 3d at 638.

Plaintiff does not, as Defendants suggest, seek to impose civil penalties on Defendants. However, the penalty factors listed in Section 42(h) convey the legislature's understanding of the types of remedies that are required to realize the goals of the IEPA. It is clear that the legislature considered punishment and deterrence of future violations to be important tools in achieving compliance with the IEPA. This is no less true in a private action for damages than in a governmental enforcement action.

Finally, Defendants claim that their conduct does not rise to the level of wrongdoing necessary to support the imposition of punitive damages. Although there is significant evidence to support a finding that Defendants' conduct warrants the imposition of punitive damages, including the testimony of OSFM personnel that Defendants' violations were "willful" in nature (C 20935-

36), this is not a question that this Court now needs to decide. Plaintiffs are merely seeking the opportunity to present evidence relating to the factors listed in Section 42(h) and to have the factfinder consider those factors when determining an appropriate judgment. Defendants are free to refute that evidence and to argue their lack of culpability at trial. All that is at issue here is whether those factors that the legislature has determined to be appropriately calculated to achieve the goals of the IEPA can be considered in a private action.

CONCLUSION

Allowing a private action for damages incurred due to a violation of the IEPA would certainly help effectuate the Act's purposes of protecting the health, safety and welfare of Illinois residents by preventing damage to the environment. There is no doubt that Defendants violated the IEPA. There is no doubt that Plaintiff suffered serious physical injuries as a direct result of those violations. At issue is whether the law affords Plaintiff the opportunity to seek remedies for injuries caused by Defendants' violation of the IEPA.

For the reasons stated herein and in Plaintiff's Brief, this Court should reverse the judgment of the appellate court, permit Plaintiff to proceed with her claims under the IEPA, and enter any alternative or additional relief that this Court deems warranted and just.

Respectfully submitted,

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RULE 341(C) CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 341(c), I certify that this brief 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 5,599 words.

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No. 129628

IN THE SUPREME COURT OF ILLINOIS

LAURA RICE, as Special Representative of the Estate of MARGARET L. RICE, Deceased,	)	On appeal from the Appellate Court of Illinois, First District, No. 1-22-0155
Plaintiff-Appellant, v.	)	There heard on appeal from the Circuit Court of Cook County, Illinois, No. 2018 L 000783
MARATHON PETROLUEM CORPORATION, a Delaware Corporation, SPEEDWAY, LLC., a Delaware Limited Liability Company, and MANOJ VALIATHARA,	)	Honorable James M. Varga, Judge Presiding
Defendants-Appellees.	)	

NOTICE OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

Please take notice that on January 31, 2024, I electronically filed the REPLY OF PLAINTIFF-APPELLANT with the Clerk of the Illinois Supreme Court.

The undersigned served this NOTICE OF ELECTRONIC FILING and the REPLY OF PLAINTIFF-APPELLANT via electronic mail to the individuals named below on January 31, 2024. Under penalties as provided by law pursuant to Section 1-109 of the Civil Code of Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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