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, TRAIL QUEST, INC., *Defendants.*	Appeal from the Appellate Court of Illinois, First District, No. 1–17–2349 There heard on appeal from the Circuit Court of Cook County, Illinois, No.: 13 L 8261 The Honorable John H. Ehrlich, Judge Presiding

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The trial court properly granted summary judgment as to plaintiffs' design defect claim.

In reversing summary judgment, the appellate court held that evidence of compliance with OSHA and FMCSR regulations, ANSI standards, and TTMA recommended practices could properly be considered under the risk-utility and consumer expectations tests. (A13/¶44, A15/¶53.) Because those regulations, standards and recommended practices are inadmissible, the appellate court's opinion must be reversed.

A. Regulations and standards not applicable to East or the Trailer are irrelevant.

1. The regulations, standards, and recommended practices were inadmissible.

Plaintiffs devote a scant two paragraphs to the substantive admissibility of the regulations, standards and recommended practices. (Pl. Br. at 39–40).

Plaintiffs claim Gary Hutter's opinion that "vehicles are subject to OSHA while being loaded" created a question of fact as to admissibility of the OSHA regulation. (Pl. Br. at 40.) But an expert may not offer opinions as to legal conclusions (*Lid Associates v. Dolan*, 324 Ill. App. 3d 1047, 1058 (1st Dist. 2001)) and is not competent to testify regarding statutory interpretation (*Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 261 (1st Dist. 1982)). Whether the Trailer design was subject to the OSHA regulation is a question of law for the court, not a matter for expert opinion.

Plaintiffs also claim Hutter's testimony regarding SAE standards created a question of fact. (Pl. Br. at 40.) Plaintiffs' opposition to summary judgment before the

trial court never mentioned the SAE standards (C2053–66) and plaintiffs' appellate court brief contained only a passing reference (Pl. App. Br. at 10). The argument that SAE standards are admissible evidence is forfeited. *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶14.

Even if preserved, plaintiffs cite only Illinois Pattern Jury Instruction, Civil, No. 60.01 for the proposition that the SAE standards are admissible. (Pl. Br. at 40.) This instruction is not a rule of evidence but rather guides a jury's consideration of evidence. Further, this instruction "pertains only to a party's violation of a statute or ordinance" or of "administrative rules, regulations, and orders" that have been "validly adopted and have the force of law." *Davis v. Marathon Oil Co.*, 64 Ill. 2d 380, 389-90 (1976). SAE standards do not have the force of law. IPI Civil No. 60.01 provides no authority for their admission as evidence.

East's opening brief detailed why, as a matter of law, the OSHA regulation does not govern manufacturers or product features. (East Br. at 24–35.) Plaintiffs effectively concede this point by offering no argument to the contrary. Plaintiffs also make no argument regarding the substantive admissibility of FMCSR regulations, ANSI standards, or TTMA recommended practices, effectively conceding their inadmissibility.

The appellate court reversed the trial court's summary judgment ruling based on the conclusion that "OSHA… ANSI, FMCSR, and TTMA standards are… relevant for the jury's consideration." (A14/¶45, A15/¶53.) Because these regulations, standards, and recommended practices were not admissible evidence, the appellate court's opinion must be reversed.

2. The regulations, standards, and recommended practices may not be considered as a basis for an expert's opinion.

Plaintiffs direct the bulk of their argument to a new theory: that the regulations, standards, and recommended practices are properly considered, not substantively, but as the basis for Hutter's opinions.

a. Plaintiffs forfeited this argument.

Plaintiffs claim the appellate court framed the issue as "whether the expert can rely on these standards when determining whether the step geometry was defective." (Pl. Br. at 2.) The appellate court said no such thing. To the contrary, as plaintiffs concede later in their brief, "[t]he appellate court described the issue as simply whether the steps complied with various recommended practices under OSHA, ANSI, FMCSR, and TTMA." (Pl. Br. at 23, citing A13/¶43.) That is, the appellate court considered these criteria as substantive evidence, not merely as a basis for Hutter's opinions.

In undertaking *de novo* review, this Court is not confined to the reasons given by the lower courts for their decisions. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). As appellants before the appellate court, however, plaintiffs may not raise arguments now that they did not raise below. *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 209 (1983).

Plaintiffs argued in the trial court that they had "provided *evidence* that the ladder did not conform with design standards and criteria set forth by OSHA, FMCSR, ANSI and TTMA." (C2061, emphasis added.) Plaintiffs urged the appellate court to consider the regulations, standards and guidelines as "*evidence* of the standard of care." (Pl. App. Br. at 14, emphasis added.) Indeed, the OSHA regulation upon which plaintiffs relied in opposing summary judgment, 29 C.F.R. §1910.23(b)(2)

and (4), (d), is not even the same regulation Hutter identified as a basis for his opinions, 29 C.F.R. §1910.27 (Lexis 2012). (Compare C2054–55 and Pl. App. Br. at 9 with C1252, C2177.) The argument that the regulations, standards, and recommended practices were properly considered as a basis for Hutter's opinion, raised for the first time in this Court, is forfeited. *1010 Lake Shore Ass'n*, 2015 IL 118372, ¶14.

b. Experts may not offer opinions regarding inadmissible regulations, standards, and recommended practices.

Even if this argument had been preserved, plaintiffs identify no authority permitting expert opinion that a product violates a regulation, standard, or recommended practice that has been deemed inadmissible because it does not apply.

At best, plaintiffs point to *McShane v. Chicago Investment Corp.*, 235 Ill. App. 3d 860 (1st Dist. 1992), in which the appellate court approved testimony regarding regulations adopted after the construction of an allegedly defective elevator "because the regulations were used, not to prove a violation, but as evidence of general negligence and disregard for public safety." (Pl. Br. at 27, citing *McShane*, 235 Ill. App. 3d at 877–78.) Under the risk-utility test, whether a product's design conforms to relevant "design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation"— that is, whether the guidelines or regulations were violated—is a relevant factor the court may consider. *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 263–64 (2007). "Evidence of general negligence" is not. Plaintiffs offer no rationale for allowing an expert to opine that guidelines or regulations were violated where evidence of the guidelines themselves has been deemed irrelevant and inadmissible.

c. Plaintiffs established no foundation for expert reliance on the regulations, standards, and recommended practices.

Plaintiffs also failed to establish a proper foundation for Hutter's reliance on the regulations, standards, and recommended practices. An expert may "express an opinion based on facts or data not admissible in evidence only if the facts or data are of a type reasonably relied upon by experts in the particular field." *Chicago v. Anthony*, 136 Ill. 2d 169, 190 (1990). Plaintiffs identify no evidence that experts in Hutter's field reasonably rely on the regulations, standards, and recommended practices in evaluating the safety of a frameless aluminum dump trailer.

The trial court bears responsibility for determining whether the bases for an expert's opinions "meet minimum standards of reliability as a condition of admissibility." *Id.*, at 186. The trial court must consider the "reason for the substantive inadmissibility of the facts or data upon which an expert relies." *Id.* To hold otherwise "would allow the proponent of otherwise inadmissible evidence to summarily circumvent its exclusion if he is able to find an expert to rely upon it in forming his opinion." *Lovelace v. Four Lakes Development Co.*, 170 Ill. App. 3d 378, 384 (2nd Dist. 1988). For "facts or data to be reasonably relied upon by an expert…, the facts or data must be legally relevant." *Id.*, at 190.

The trial court's oral ruling did not address whether a sufficient foundation was laid to permit reliance on the regulations, standards, or recommended practices. The trial court did, however, determine that these criteria were irrelevant because they do not apply to dump trailers. (SupR244.) If "an expert relies upon facts or data which are irrelevant…, then the facts or data so relied upon would… be of no benefit to a jury." *Anthony*, 136 Ill. 2d at 187.

In reality, the regulations, standards, and recommended practices are not offered as a basis for Hutter's opinions but rather, as an attempt to bolster Hutter's opinions by suggesting other authorities have deemed the "step geometry" on the Trailer unsafe. (Pl. Br. at 25, "these standards would show a jury what is deemed safe by other authorities".) That is precisely the problem. The regulations, standards, and recommended practices do not show what the authorities adopting them deemed safe for a dump trailer because they do not apply to dump trailers. That the regulations, standards, and recommended practices might seem to "carry a markedly higher degree of reliability than hearsay" highlights the prejudice of allowing expert testimony of those provisions: although the regulations, standards, and recommended practices are legally irrelevant, a jury hearing testimony about them would assume they carry a high degree of reliability regarding the safety of the Trailer.

Plaintiffs suggest that any concerns regarding the reasonableness of Hutter's reliance on the regulations, standards, and recommended practices can be addressed through cross-examination. (Pl. Br. at 29.) But a party's ability to cross-examine an expert does not relieve the trial court of its independent responsibility to decide whether the bases for an expert's opinion meet minimum standards of reliability. *Anthony*, 136 Ill. 2d at 186. And expert testimony regarding the applicability OSHA and FMCSR regulations, whether on direct- or cross-examination, would be improper. *Christou*, 104 Ill. App. 3d at 261; *Lid Associates*, 324 Ill. App. 3d at 1058.

Plaintiffs suggest East "wants to modify *Wilson v. Clark*[, 84 Ill. 2d 186 (1981)] so that experts can no longer rely on government standards and industry regulations unless those standards and regulations are directed solely to the product

in question." (Pl. Br. at 27.) In fact, East does not believe this Court should address the application of *Wilson v. Clark* to this issue at all because plaintiffs did not preserve the argument. Should this Court be inclined to nevertheless address this issue, however, East seeks only to hold plaintiffs and their expert to the well-established foundational requirements regarding the facts and data upon which an expert may rely under *Wilson* and its progeny.

d. This Court has never approved expert reliance on inapplicable regulations, standards, or recommended practices to establish strict product liability.

Plaintiffs contend this Court already addressed the specific issue in this case in *Schultz v. N.E. Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260 (2002). As East explained in its opening brief, however, *Schultz* addressed the admissibility of OSHA regulations as evidence of the standard of care in a case alleging negligence. *Schultz* did not address the admissibility of regulations or other standards—whether as substantive evidence or as a basis for expert opinions—to establish an unreasonably dangerous defect in strict product liability action.

Suggesting the two theories of liability "present very similar issues," plaintiffs brush aside the distinction between negligence and strict product liability claims as "one without a difference." (Pl. Br. at 32.) This Court in *Rucker v. Norfolk & Western R. Co.*, 77 Ill. 2d 434 (1979), however, did not treat the distinction between the two theories so dismissively. While a defective design case based on strict product liability resembles one based on negligence to the extent that "reasonableness" is an element of both theories, this Court emphasized that the "elements of the plaintiff's proof remain those of an action in strict liability." *Id.*, at 439. In the strict product

liability context, only evidence that "a *product*, not a manufacturer's conduct, conforms to Federal standards" is admissible. *Id.* (emphasis added).

In *Rucker*, the plaintiff claimed that the absence of a headshield rendered the defendant's liquefied petroleum gas tank car unreasonably dangerous. *Id.*, at 437. The trial court barred the defendant from presenting evidence that the applicable federal regulations did not require a headshield. *Id.* Contrary to the plaintiffs' characterization of *Rucker*, the question this Court decided was not "whether the standard supported the expert's opinion" (Pl. Br. at 33) and this Court never held in *Rucker* "that experts can rely on government and industry standards as a basis for opinions." (Pl. Br. at 32.) *Rucker* addressed whether the defendant "should be allowed to show that a given alternative design is not required by Federal regulations," and did not suggest expert testimony on this point was ever offered. *Id.*, at 438. Plaintiffs acknowledge that the standard relied on in *Rucker* addressed the product at issue, but assert that this was not a basis for the *Rucker* court's decision (Pl. Br. at 33). That argument is untenable as a regulation cannot require a design for a product it does not govern.

Plaintiffs attempt to distinguish *Ruffiner v. Material Service Corp.*, 116 Ill. 2d 53, 60 (1987), because that opinion addressed "admission of the [ANSI] standards into *evidence*" and "does not mention *Wilson*, likely because counsel did not raise the case." (Pl. Br. at 35, emphasis in original.) But the appellate court's opinion in this case likewise "does not mention *Wilson*," undoubtedly because counsel here "did not raise the case" until its brief before this Court.

Similarly, plaintiffs suggest the appellate court's holding in *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430, is "an outlier, relegated to the sidelines," because

(among other things) the *Zickuhr* court addressed the exclusion of OSHA regulations as evidence rather than addressing what plaintiffs consider "the real issue" of whether an expert can rely on OSHA regulations. (Pl. Br. at 36.) However much plaintiffs may wish to reframe the "real issue" in these cases, the defendant in *Zickuhr* sought to introduce the OSHA asbestos regulations themselves into evidence, not an expert opinion relying on the regulations. *Zickuhr*, 2011 IL App (1st) 103430, at ¶28. Contrary to plaintiffs' belief, the appellate court in *Zickuhr* understood perfectly well the "real issue" it was called upon to decide.

e. This Court's "time and conduct involved" requirement applies in strict product liability cases.

Plaintiffs question the applicability in a strict product liability case of the "time and conduct involved" standard established in *Murphy v. Messerschmidt*, 68 Ill. 2d 79, 84 (1977), as a foundational threshold for admissibility of regulations, standards, and similar matters. But plaintiffs' question was answered in *Ruffiner*, 116 Ill. 2d at 59, in which this Court applied the "time and conduct involved" requirement in a seaworthiness case, which it noted would be analogous to a strict product liability case.

The *Ruffiner* court held that the ANSI fixed ladder standard was not relevant to a defective design claim regarding ladders on a towboat because the "ANSI standards would be applicable to fixed ladders in factories, power stations, and other land-based industrial facilities," not to ladders on a towboat. *Id.* (At the time *Ruffiner* was decided, the ANSI standards did not indicate "that their application is limited to those settings." *Id.* The ANSI standard relied upon by plaintiff, by contrast, expressly limits its "application to the types of structures depicted and described in the standard (i.e., buildings, wells, and shafts)." C2119 at §1.5.1.)

To illustrate proper application of the "time and conduct involved" requirement, the *Ruffiner* court compared the opinions in two strict product liability cases: the appellate court's decision in *Galindo v. Riddell, Inc.*, 107 Ill. App. 3d 139, 147 (3rd Dist. 1982), and this Court's opinion in *Rucker*. *Ruffiner*, 116 Ill. 2d at 59. In *Galindo*, this Court observed, the appellate court held that "standards applicable to headgear used for vehicular crashes [was] properly excluded in [an] action for injuries caused by [an] allegedly defective football helmet." *Id.* In *Rucker*, this Court held that "standards concerning construction of liquefied petroleum gas tank cars [were] admissible in action based on explosion of such a tank car." *Id.*

Plaintiffs argue that "unless the standard at issue is in some way specifically limited to the device it addresses and could not logically be instructive in any context other than that addressed by the standard, it is normally likely to be 'relevant in terms of both time and conduct involved." (Pl. Br. at 37.) This argument is supported by no authority and ignores that the standards at issue are all limited to specific contexts. (See TTMA Br. at 10, 15)

Further, this Court has rejected plaintiffs' reasoning that "[i]f a step with a geometry different than that shown in a standard constitutes a safety hazard in the context addressed by that standard, it is in all likelihood a safety hazard in other contexts including this one" (Pl. Br. at 37). In *Ruffiner*, the plaintiff argued that the ANSI fixed ladder standards were properly admitted because "a basic design goal for the shipboard ladders would be safety, a goal that the ANSI standards were intended to promote." *Id.* This Court disagreed: "That the design of shipboard ladders would be animated by a concern for safety does not by itself make the ANSI standards

relevant—to hold otherwise would ignore the differences between the types of activity involved." *Id.*

B. The remaining factors under the integrated risk-utility test support the trial court's judgment.

The appellate court's opinion rests on the erroneous holding that the regulations, standards, and recommended practices were properly considered as evidence of a dangerously defective design. Recognizing that this Court is not bound by the reasons given by the lower courts (see *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 305) and anticipating plaintiffs might assert alternative grounds for affirming the appellate court (see Pl. Br. at 39), East's opening brief was not limited to the appellate court's faulty reasoning but also addressed the correctness of the trial court's judgment.

1. The correctness of the trial court's judgment is properly before this Court.

Plaintiffs urge affirmance of the appellate court's judgment, even if the regulations, standards, and recommended practices cannot be considered, "because his claim rests on alternative theories." (Pl. Br. at 39.) Yet they insist East is barred from addressing their alternative arguments because East did not address them in its petition for leave to appeal (PLA). (Pl. Br. at 40.)

In reversing summary judgment as to plaintiffs' design defect claim, the appellate court held the regulations, standards, and recommended practices were properly considered as evidence relevant to one factor under the risk-utility test (conformity with industry standards and governmental regulations) and did not indicate it would reverse absent that holding. Limiting this Court's review to admissibility of the regulations, standards, and recommended practices would require

reversal of the appellate court if its holding on this point is wrong. To the extent plaintiffs seek affirmance of the appellate court's judgment on alternative grounds, however, East was entitled to anticipate and is entitled to respond to such argument by explaining why the trial court's judgment was correct. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007) (arguments in a party's briefs may be developed "in considerably more detail" than in the party's PLA).

According to plaintiffs, any error in considering the regulations, standards, and recommended practices "does not affect or restrict risk-utility claims based on" failure to install a grab handle or failure to warn. (Pl. Br. at 39.) The appellate court's risk-utility analysis, however, treated the grab handle and "step geometry" as part of a single design defect claim. (A12–14/¶¶40–48.) The appellate court's analysis of the unreasonably dangerous condition element focused on step geometry. (A11–16/¶¶37–53.) Analysis of the element requiring that the dangerous condition existed at the time of sale focused on the absence of a grab handle. (A16–18/¶¶54–59.) Both elements were necessary to establish a product defect claim. (A11/¶36.)

That the appellate court did not separately weigh the risk-utility factors as applied to the grab handle claim, and did not address the absence of a grab handle in its unreasonably dangerous condition analysis demonstrates that the appellate court did not consider the absence of a grab handle as an independent basis for reversing the trial court. Indeed, if summary judgment were reversed as to the grab handle claims as an independent theory, review of summary judgment as to the step geometry theory would remain necessary.

East was not required to anticipate, and has not forfeited the right to respond to, plaintiffs' argument that the absence of grab handles alone established an

unreasonably dangerous condition under the risk-utility test. See *People v. Whitfield*, 228 Ill. 2d 502, 514 (2007). The bare assertion that the grab handle claim survives summary judgment under the risk-utility test, not meaningfully developed, is forfeited. See *Doe v. Coe*, 2019 IL 123521, ¶26 (quoting Ill. S. Ct. R. 341(h)(7)).

Plaintiffs also imply that the consumer expectation test provides an independent basis for the appellate court's decision, noting that "the risk-utility test is one of two tests…, the other being consumer expectation." (Pl. Br. at 39.) But the appellate court's consumer expectations analysis explicitly relied on the holding "that OSHA and ANSI standards are relevant for the purposes of determining whether the cast iron steps were defective and unreasonably dangerous." (A15/¶53.) Further, although a "product's design may be found to be unreasonably dangerous and, thus, defective under either… test" (*Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 532 (2008)), the broader risk-utility test must be applied if implicated by the evidence (*id.*, at 556). The "risk-utility test is an 'integrated' test," with "consumer expectations… but one of the factors to be considered" (*id.*, at 555), not an independent basis for liability.

East acknowledges that the appellate court's failure to warn analysis does not explicitly address the regulations, standards, and recommended practices. The appellate court, however, acknowledged that "there is no duty to warn where the product is not defectively designed or manufactured." (A18/¶63.) The finding that the Trailer was defectively designed, in turn, was based on the appellate court's consideration of the regulations, standards, and recommended practices. Thus, East believes the issues raised in its PLA fairly encompass the failure to warn claim.

Finally, "failure to assert [an] argument in the petition for leave to appeal does not preclude consideration" by this Court. *Dineen v. Chicago*, 125 Ill. 2d 248, 266 (1988). Review is appropriate when an issue not specifically mentioned in the PLA is "inextricably intertwined" with matters properly before the court. *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 430 (2002). See also, *Dineen*, 125 Ill. 2d at 266 (noting that this Court has addressed issues omitted from the PLA which "concerned portions of [the cause] of action that had been presented to and adjudicated by the lower courts).

2. The consumer expectations test supports the grant of summary judgment.

Plaintiffs contend they preserved their consumer expectations argument by: (1) noting that a plaintiff may demonstrate a design defect under either of two tests; and (2) "list[ing] all the ways this trailer did not perform safely as a consumer would expect." (Pl. Br. at 48.) But plaintiffs' listing of their complaints about the design of the Trailer made no mention of what a typical consumer or user would expect. (C2061.) Plaintiffs did not develop any argument about how these design features failed to perform as expected, instead addressing the features in terms of risk-utility factors such as compliance with standards and feasible alternative designs. (C2061.) The vague and skeletal reference to the consumer expectations test was insufficient to preserve this argument. See *Vician v. Vician*, 2016 IL App (2d) 160022, ¶31; *McIntyre v. Balagani*, 2019 IL App (3d) 140543, ¶91.

Plaintiffs' contention that a heading in East's appellate court brief shows that the consumer expectations argument was preserved (Pl. Br. at 48) is nonsensical and supported by no authority. East structured its appellate court appellee brief by providing responsive arguments under headings identical to those used in plaintiffs'

appellate court opening brief. East did not concede that the consumer expectations test was at issue all along by mirroring plaintiffs' headings to organize its response.

Even if preserved, plaintiffs failed to produce evidence to raise a genuine issue under the consumer expectations test. Plaintiffs question East's assertion that evidence was required to demonstrate the expectations of a typical user or purchaser of a dump trailer. (Pl. Br. at 50.) Jurors "are presumed to be competent in everything pertaining to the ordinary and common knowledge of mankind." *People ex rel. Adams v. Kite*, 48 Ill. App. 3d 828, 833 (5th Dist. 1977). "Matter[s] outside of common experience," however, "require[ ] proof." *Id.* As the average citizen does not typically purchase or use dump trailers, the average juror lacks knowledge or experience as to what the typical purchaser of a dump trailer would expect. See, e.g., *Rinesmith v. Sterling*, 293 Ill. App. 3d 344, 348 (4th Dist. 1997) ("While most people, including the average juror, are familiar with the driving of an ordinary automobile, the driving of a tractor pulling a semitrailer hauling heavy steel coils is clearly not a matter within the 'ken of the average juror.'")

East presented unrebutted testimony that the steps on the Trailer were precisely what the typical purchaser of a dump trailer expected. The steps were standard throughout the dump trailer industry (C2384, C2385–86) and worked well for Trail Quest for over 20 years (C1934). Having failed to offer contrary evidence, plaintiffs now argue that "the issue is only what Gillespie as the end user might reasonably expect," not what purchasers like Trail Quest would expect. Plaintiffs cite no authority for this proposition, which is directly contrary to this Court's holding that the "ordinary consumer"—whose expectations control—is "the typical user *and purchaser*" of a product. *Calles*, 224 Ill. 2d at 257 (emphasis added).

Plaintiffs produced no evidence that the typical user or purchaser of a frameless dump trailer would expect a rung-style ladder or would expect steps with different spacing or dimensions. Accordingly, the consumer expectations test does not support reversal of the trial court's grant of summary judgment in favor of East.

3. Plaintiffs failed to show a safer design was feasible.

Plaintiffs argue that East forfeited any feasibility argument because it did not raise the issue in its motion for summary judgment and plaintiffs found only one mention of the word "feasible" in East's appellate court brief. (Pl. Br. at 41.) As the appellee before the appellate court, however, East "may raise any issues properly presented by the record to sustain the judgment of the circuit court." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 431 (2006).

Plaintiffs argue briefly that they presented sufficient evidence of a feasible alternative design based on testimony that: (1) "East and its competitors offered rung-style ladders;" (2) Gillespie has seen rung-style ladders on steel trailers; (3) unidentified Barge mechanics reportedly told Gillespie that a rung-style ladder could be installed on the Trailer; and (4) Wells (East's vice president of sales and marketing) testified that trailers have been sold with rung-style ladders. (Pl. Br. at 42.)

The availability of rung-style ladders generally and the fact that Gillespie has seen such ladders on a different type of trailer does not establish that a rung-style ladder could feasibly have been installed on the Trailer. Gillespie admitted that he never saw that type of ladder installed on a frameless aluminum trailer. (C1793.) The hearsay testimony of unidentified mechanics (whose qualifications are unknown) is inadmissible. As for Wells' testimony, it is entirely unclear what type of trailer he

testified was sold with a rung-style ladder. While he answered "Yes" to a question regarding whether "this product" had been sold with a rung-style ladder, the preceding discussion sheds no light on what product "this product" referred to. (C2430.)

4. Cast-aluminum steps are routinely used on dump trailers without injury.

In addressing the evidence that the step configuration on the Trailer has been used safely for decades, plaintiffs argue that testimony from Robert Edmier (the owner of Barge and Trail Quest) regarding the absence of injuries "is not relevant to what defendant East Manufacturing knew or should have known." (Pl. Br. at 43.) Plaintiffs offer neither authority nor developed analysis to support this bare assertion. "[T]he period of time [a product] could be used without harm resulting from the product" is properly considered under the risk-utility test to determine whether a product is dangerously defective, not to assess what a manufacturer knew or should have known. *Calles*, 224 Ill. 2d at 265–66.

In the next breath, plaintiffs argue that testimony from East employees cannot be considered on this point because East is required to show that "the absence of claims occurred when the same product was used under conditions substantially similar to those present in the current case." (Pl. Br. at 43–44.) Plaintiffs do not explain why Edmier's testimony would be inadequate to make this showing.

Finally, plaintiffs point to Gillespie's testimony that he had two or three close calls with the Trailer prior to his accident. (Pl. Br. at 44.) Given that Gillespie used the Trailer hundreds of times with only two or three occasions "where [he] *could have* slipped" but never actually hurt himself (C1773, emphasis added), "the period of time [the Trailer] could be used without harm resulting" is a factor favoring East.

5. Gillespie was aware of the obvious danger of attempting to climb over the tarp cap.

Citing *Calles*, plaintiffs argue that "the open and obvious rule does not apply because the trailer is not a simple product." (Pl. Br. at 45.) This argument is perplexing. In *Calles*, this Court considered and rejected a "simple product exception" to the risk-utility test that had been adopted by the appellate court in *Scoby v. Vulcan-Hart Corp.*, 211 Ill. App. 3d 106 (4th Dist. 1991). *Calles*, 224 Ill. 2d 247, 259–63. Whether a product is simple or complex, this Court held, "the open and obvious nature of a danger is one factor that may be weighed in the risk-utility test." *Id.*, at 263.

6. Gillespie could have readily avoided the danger.

Plaintiffs contend that Gillespie could not have avoided the danger by directing the loader to load the Trailer with less mulch, just as he did when preloading the Trailer following the accident. (Pl. Br. at 46.) Plaintiffs "assume" Gillespie's employer would not permit this, but identify no evidence to support this assumption. In fact, Gillespie testified that he "loved" the Trailer "[b]ecause [he could] haul bigger loads and get paid more money." (C1785.)

Plaintiffs also assert that "the front-end loader dumps mulch onto the bows regardless of whether the trailer is loaded to its capacity, so there would be times when they would have to be cleaned regardless of whether the trailer was fully loaded." (Pl. Br. at 47.) Again, plaintiffs cite nothing in the record to support this claim. Even if some mulch remained on top of the bows, the bows do not need to be "completely free and clear of mulch" for the tarp to function properly so long as the mulch is not piled more than six inches above the bows. (SupR116–17.)

C. East cannot be held liable for the substantial modification to the dump trailer made by Ken's Truck.

Plaintiffs argue that East can be held liable for the danger created by the addition of the tarp cap because this was a foreseeable modification. Despite plaintiffs' contention that East knew tarps are "*almost always* installed" (Pl. Br. at 51, emphasis added), the testimony they cite acknowledges that "*oftentimes* the tarps are put on the trailer after it leaves the facility" (SupR78, emphasis added). Whether a tarp is installed "depends on the use of the trailer" and the type of material the customer intends to haul. (SupC171.) When a tarp and tarp cap are installed, more than 100 different tarp cap configurations are available. (C2447; SupC113.) East did not know Ken's Truck's customer or its needs. (SupR174.) Requiring manufacturers to account for and design around every danger potentially created by hundreds of possible post-sale modifications would impose a daunting (if not impossible) burden on manufacturers selling products in Illinois. (See Chamber Br. at 12.)

More importantly, manufacturers are required only to "anticipate modifications that *operators* can easily effect." *Pommier v. Jungheinrich Lift Truck Corp.*, 2018 IL App (3d) 170116, ¶35 (emphasis in original). Citing "common sense" as authority, plaintiffs argue that "limit[ing] liability for foreseeable modifications to instances where the purchaser itself makes the modification, and exclud[ing] instances where the purchaser contracts with a third party to modify the product, surely makes no sense." (Pl. Br. at 53.) Plaintiffs' "common sense" is contrary to the consistent holding of the appellate court limiting the foreseeable modifications for which a manufacturer can be held liable to those which can be made: (1) easily; and (2) by an operator with incentive to do so. See *Davis v. Pak-Mor Manufacturing Co.*, 284 Ill. App. 3d 214, 220 (1st Dist. 1996); *Woods v. Graham Engineering Corp.*, 183 Ill.

App. 3d 337, 342 (2nd Dist. 1989); *Pommier*, 2018 IL App (3d) 170116, at ¶35; *De Armond v. Hoover Ball & Bearing, Uniloy Division*, 86 Ill. App. 3d 1066, 1071 (4th Dist. 1980).

The rationale for this rule lies in the context in which it has been applied: cases where a safety feature is removed or disabled by the product's user. See, e.g., *Davis*, 284 Ill. App. 3d at 220–21; *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382, ¶3. In such cases, the dangerous condition existed at the time the product left the manufacturer's control and the safety feature designed to mitigate that danger was inadequate because it was easily disabled by a user with incentive to disable it. Plaintiffs cite no authority holding a manufacturer liable for a new danger created by a substantial modification made by a third-party after the product left the manufacturer's control.

II. The trial court properly granted summary judgment with respect to plaintiffs' failure to warn claims.

Finally, plaintiffs cite no authority in support of their argument that entry of summary judgment was properly reversed as to the failure to warn claim. "[A] point raised in a brief but not supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341[(h)](7), and is thus forfeited." *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006).

Plaintiffs also ignore East's argument that a manufacturer's duty to warn is limited to dangers existing at the time of sale. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ ¶111, 116. Plaintiffs cite and East knows of no authority extending the duty to warn to new dangers created by a third-party's post-sale installation of optional components.

Finally, plaintiffs make the curious argument that Gillespie's own knowledge of the alleged need for a grab handle does not affect East's duty to warn because "the warning was not to run from East to Gillespie but rather from East to Trail Quest." (Pl. Br. at 58.) If East owed a duty to warn to either Ken's (to whom it sold the Trailer) or to Trail Quest (which bought the Trailer from Ken's), but not to Gillespie, then plaintiffs cannot recover. See, e.g., *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 44 (2004) ("no recovery in tort for negligence unless the defendant has breached a duty owed to the plaintiff"); *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 364 (2009) ("before a plaintiff may recover for a breach, they must allege that the breach was related to a duty the plaintiff was owed"); *In re Marriage of Ferkel*, 260 Ill. App. 3d 33, 40 (5th Dist. 1994) ("basis of every action for damages is the duty which one party owes to the other personally").

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, East Manufacturing Company, respectfully requests that this Court reverse the judgment of the appellate court and affirm the judgment of the circuit court.

Respectfully submitted,

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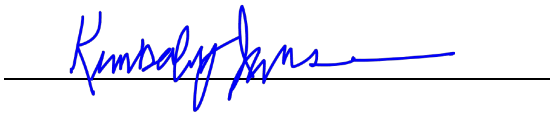
Dated: July 29, 2020

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 5,997 words.



CERTIFICATE OF SERVICE

I, Kimberly A. Jansen one of the attorneys for defendant-appellee, certify that I electronically filed the foregoing **Appellant's Reply Brief** with the Clerk of the Illinois Supreme Court, on July 29, 2020, via Odyssey eFileIL.

I further certify that on July 29, 2020, an electronic copy of the foregoing **Appellant's Reply Brief** is being served on the following counsel of record via Odyssey eFileIL:

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Under penalties as provided by law pursuant to §1–109 of the Code of Civil Procedure (735 ILCS 5/1–109), I certify that the statements set forth in this instrument are true and correct.