No. 130862/130863 Consolidated

IN THE SUPREME COURT OF ILLINOIS

MARTIN PRODUCE, INC. Third-Party Plaintiff/Appellee, v. JACK TUCHTEN WHOLESALE PRODUCE, INC. and LA GALERA PRODUCE, INC., Third-Party Defendants/Appellants.	Appeal from Appellate Court of Illinois, First Judicial District, Fifth Division Appellate Court No: 1-23-1369 Circuit Court of Cook County, Illinois Court No. 2016L006628

THIRD-PARTY DEFENDANT/APPELLANT JACK TUCHTEN WHOLESALE PRODUCE, INC.'S REPLY BRIEF

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STATEMENT OF POINTS AND AUTHORITIES

I. ARGUMENT

A. The Filing Of The Personal Injury Complaints Does Not Satisfy The Actual Knowledge Exception To The UCC Notice Requirement

Martin concedes that it did not provide notice under Section 2-607(3)(a) of the UCC to Jack Tuchten that its cilantro was defective. Martin even readily admits to this day it does not believe that Jack Tuchten's cilantro was defective.

Martin asserts that it was not required to provide notice under Section 2-607(3)(a) based on application of the actual knowledge exception to the UCC notice requirement enunciated in C*onnick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494 (1996). As Martin's argument goes, the personal injury complaints naming Jack Tuchten were sufficient to satisfy the actual knowledge exception to the notice requirement because the plaintiffs alleged that Jack Tuchten's cilantro was defective. In ruling on this issue, the appellate court found that Martin was relieved of of its obligation to provide UCC notice because the personal injury complaints gave Jack Tuchten "actual knowledge that the cilantro *they* sold was alleged to be defective." (A123, ¶ 43.)

The *Connick* decision does not support application of the actual knowledge exception in our case. The *Connick* Court did not hold that a merchant buyer is able to satisfy the actual knowledge requirement by relying on the filing of another's complaint against the merchant seller alleging a product defect. Under *Connick*, only a personal injury plaintiff can rely upon the filing of a complaint as a substitute for providing UCC notice. *Id.* at 495.

The *Connick* Court's holding was as follows:

> "Since the instant plaintiffs did not allege that they suffered personal injuries as a result of the Samarai's alleged rollover risk, the section 2-607

> notice requirement was not fulfilled by filing a breach of warranty claim." *Id.*

Moreover, allowing a merchant buyer to use the filing of personal injury to satisfy the actual knowledge exception is inconsistent with the *Connick* Court's holding. The plaintiffs in *Connick* were vehicle purchasers that filed suit against a seller asserting a breach of implied warranty claim for an alleged product defect without first providing notice under Section 2-607(3)(a). The *Connick* Court did not allow the plaintiffs to use the filing of their complaint as a basis to satisfy the actual knowledge exception.

In our case, Martin cannot use the filing of the personal injury complaints to satisfy the actual knowledge exception as a substitute for Martin's obligation to provide UCC notice. The *Connick* plaintiffs were unable to use the filing of their complaint against the seller to satisfy the actual knowledge exception. Yet, the appellate court in our case allowed Martin to use the filing of personal injury complaints to satisfy the actual knowledge exception. There is no rational basis to allow a merchant buyer to use another's complaint to satisfy the actual knowledge exception when it cannot use its own complaint for the same purpose.

A complaint allegation of a product defect does not satisfy the actual knowledge exception to relieve a merchant buyer of providing notice. Allowing a merchant buyer to satisfy the actual knowledge exception by the mere allegation of a defect in a complaint renders the UCC notice requirement meaningless. The buyer can always argue that filing of the suit alleging a defect is sufficient to satisfy the actual knowledge exception. *Connick* expressly prohibits a plaintiff that did not suffer personal injuries from using the filing of a suit as a substitute from satisfying the UCC notice requirement.

These particular personal injury complaints do not establish that Jack Tuchten had actual knowledge of a defect. The complaints assert negligence, strict product liability, and breach of warranty claims against various suppliers and the restaurant that served the plaintiffs based on an alleged product defect. There are no allegations that Jack Tuchten had actual knowledge of a defect. To the contrary, these complaints raise numerous issues about whether the cilantro was contaminated at the restaurant or by Martin, or whether one of Martin's many suppliers sold contaminated cilantro.

The actual knowledge exception requires the buyer's actual knowledge of a defect or an opportunity to inspect the product defect. The *Connick* Court discussed the three cases that formed the basis for the actual knowledge exception. Those cases are *Malawy v. Richards Manufacturing Co*., 150 Ill. App. 3d 549 (5th Dist. 1986*), Crest Container Corp. v. R.H. Bishop*, 111 Ill. App. 3d 1068 (5th Dist. 1982), and *Overland Bond & Investment Corp.*, 9 Ill. App. 3d 348 (1st Dist. 1972). In each of those cases, the buyer had actual knowledge of the defect because the buyer was able to view and inspect the product. Here, Martin never gave Jack Tuchten an opportunity to view or inspect the product. Additionally, Martin concedes that Jack Tuchten's product was not defective. Martin cannot rely upon the allegations in the personal injury complaints to satisfy the actual knowledge exception.

B. Martin Waived Its Argument That Jack Tuchten's Participation In The Personal Injury Litigation Satisfies The Actual Knowledge Exception

Martin waived the argument that Jack Tuchten's participation in the personal injury litigation is a proper basis for satisfying the actual knowledge exception. Martin goes to great lengths to present a detailed recitation of Jack Tuchten's involvement in the personal injury litigation in its response brief in an attempt to satisfy the actual knowledge exception.

However, Martin never argued before the trial court that Jack Tuchten's involvement in the personal injury litigation was a basis for satisfying the actual knowledge exception. (C3645-3660.) The only reference to Jack Tuchten's participation in the litigation in Martin's response brief in opposition to Jack Tuchten's motion for summary judgment was in the context of arguing that Jack Tuchten never raised the issue of lack of UCC notice despite its participation in the litigation.[1] (C3657.) An argument is waived if not raised in the trial court even if it is the appeal is subject *de novo* review. *Ryan v. Yarbrough*, 355 Ill.App.3d 342, 348 (2nd Dist. 2005); *Knupper v. Property Tax Appeal Bd*., 61 Ill.App.3d 884, 887 (2nd Dist. 1978).

C. Jack Tuchten's Participation In The Personal Injury Litigation Does Not Satisfy The Actual Knowledge Exception

Even when considering Jack Tuchten's litigation involvement, Martin cannot prevail in satisfying the actual knowledge exception. The discovery in which Jack Tuchten participated did not establish that Jack Tuchten had actual knowledge of a product defect. To the contrary, evidence was developed in discovery showing that the cilantro was likely cross-contaminated at the restaurant because of well-documented food safety violations for which Carbon was cited by the Chicago Department of Public Health ("CDPH"). (C2709.) Moreover, it was in the deposition of Martin employee, Alex Maciel where Jack Tuchten learned that Martin received notice from the CDPH in July 2016 of a foodborne illness outbreak at Carbon allegedly involving cilantro, but Martin never notified Jack Tuchten under Section 2-607(3)(a) of a product defect or a potential breach of implied warranty

[1] Jack Tuchten never raised the notice issue because Martin did not pursue a claim for breach of implied warranty until it filed its amended third-party complaint nearly six years after the product delivery. In addition, lack of notice is not an affirmative defense because notice is an element that Martin must plead and prove.

claim by Martin. (C2708-2709, C2863-2864, C2868, C2873.) As addressed in the section above, the actual knowledge exception requires the buyer's actual knowledge of a defect or an opportunity to inspect the product defect. C*onnick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494 (1996)*; Malawy v. Richards Manufacturing Co*., 150 Ill. App. 3d 549 (5th Dist. 1986*), Crest Container Corp. v. R.H. Bishop*, 111 Ill. App. 3d 1068 (5th Dist. 1982), and *Overland Bond & Investment Corp.*, 9 Ill. App. 3d 348 (1st Dist. 1972). Jack Tuchten's participation in the personal injury litigation does not satisfy the actual knowledge exception to relieve Martin of providing notice under Section 2-607(3)(a).

D. <u>The UCC Notice Is A Requirement That Serves The Important Purpose Of Allowing A Pre-Suit Investigation</u>

Martin seeks to be excused from its admitted failure to provide UCC notice by framing the notice requirement as a mere technicality. The inconvenient truth for Martin is that the notice requirement is a statutory element that it must allege and prove to prevail on its breach of warranty claim. Martin cannot plead that it provided UCC notice to Jack Tuchten because it admittedly never provided notice.

The UCC requires that the seller give the buyer notice of a defect within a reasonable time after delivery. 810 ILCS 5/2-607(3)(a). The intention and purpose of the UCC notice requirement is to given the seller a pre-suit opportunity to investigate, address, and/or settle any claim with the buyer. *Branden v. Gerbie*, 62 Ill. App. 3d 138, 141 (1st Dist. 1978).

Martin's failure to provide timely UCC notice to Jack Tuchten of a defect with its cilantro deprived Jack Tuchten of an opportunity to perform a full investigation. A timely investigation is especially important with a perishable food item such as cilantro. The scope of Jack Tuchten's investigation could have, among other things, included an inspection and

testing of the farms where the cilantro was grown and testing of cilantro from Jack Tuchten's suppliers before Jack Tuchten lost the ability to fully protect its interests.

Martin seems to think it can satisfy the actual knowledge exception as long as the actual knowledge is established any time before it filed its breach of implied warranty claim. Under Martin's argument, Martin benefits the longer it waits to file its breach of implied warranty claim so that it can develop as much evidence as possible to satisfy the actual knowledge exception. However, the actual knowledge, like notice under Section 2-607(3)(a), must be obtained within a reasonable time after delivery. *Branden*, 62 Ill.App.3d 138, 141 (15-month delay is not timely notice under Section 2-607(3)(a)).

Martin could have avoided this situation by simply providing UCC notice to Jack Tuchten when Martin first received notice from the CDPH in July 2016 of a foodborne illness outbreak at Carbon allegedly associated with cilantro. Instead, Martin sat on its hands and did not pursue a breach of implied warranty claim until July 1, 2022 when it filed its amended third-party complaint six years after Jack Tuchten's delivery of cilantro. (C2553-2558.) Martin should not be rewarded for its six-year delay to assert a breach of implied warranty claim.

E. There Will Be No Second Trial If This Court Affirms Summary Judgment For Jack Tuchten

Martin asserts that it should be allowed to pursue its breach of implied warranty claim in the pending trial court action because it serves the interests of judicial economy. Martin claims that if it is barred from pursuing its claim in the pending action it will just give pre-suit notice to Jack Tuchten and file a separate action asserting a breach of implied warranty claim if it does not prevail in the pending Carbon action. In Martin's own words, if Martin loses this appeal it "would then be forced to start the entire process over again –

provide pre-suit notice to the Wholesalers and litigate against the Wholesalers the very same breach of warranty claims and damages a second time." (Martin's Illinois Supreme Court Response Brief, p. 27.)

Martin's judicial economy argument is a fallacy. Martin's argument completely disregards Illinois law on *res judicata* and estoppel, which bars a subsequent action when there has been a final judgment on the merits for the same cause of action involving the same parties. *Downing v. Chicago Transit Authority*, 162 Ill.2d 70, 73-4 (1994). Martin also believes that providing pre-suit UCC notice close to nine years after product delivery will somehow satisfy the UCC requirement that notice must be given within a reasonable time after delivery. Martin's argument that it can simply provide pre-suit UCC notice before filing another breach of implied warranty claim shows a profound misunderstanding of the UCC requirement that notice must be given within a reasonable time after delivery. Martin's argument is also a tacit recognition that it must give pre-suit notice because it cannot satisfy the actual knowledge exception. If summary judgment is affirmed for Jack Tuchten, Martin will be foreclosed from pursuing a breach of implied warranty claim against Jack Tuchten in the Carbon action or any other action.

F. The Actual Knowledge Exception Does Not Apply Because Jack Tuchten Did Not Have Actual Knowledge Of A Product Defect Within A Reasonable Time After Delivery

Under the UCC notice requirement, a buyer must provide notice to the seller of the defect within a reasonable time after delivery. See 810 ILCS 5/2-607(3)(a). The actual knowledge exception is a substitute for satisfying this UCC notice requirement. C*onnick*, 174 Ill. 2d 482. As such, the actual knowledge exception requires a showing that the seller had actual knowledge of the defect within a reasonable time after delivery.

Rather than address the timeliness under the actual knowledge exception, Martin claims this argument Jack Tuchten waived this argument because it did not raise the timeliness issue in the trial court. Martin misstates the record.

Jack Tuchten did not waive the timeliness argument. Jack Tuchten, in its motion for summary judgment on Martin's amended third-party complaint, cited the law on timeliness of UCC notice as follows:

> "Notice must also be made within a reasonable time after delivery to comply with Section 2-607. A fifteen-month delay in providing notice is inadequate under Section 2-607 and bars a claim for breach of implied warranty of merchantability. *Branden v. Gerbie*, 62 Ill.App.3d 138, 141 (1st Dist. 1978). This holding is consistent with holdings in other jurisdictions that found lack of reasonable notice under Section 2-607. See *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 708 (1968) (notice one year after purchase and eight months after becoming aware of the accident was not reasonable under Section 2-607)." (C2716.)

Jack Tuchten argued in its motion that Martin could not establish timeliness of actual knowledge as a matter of law even if the personal injury complaints could be used to meet the actual knowledge exception. (C2716.) Jack Tuchten made the following argument in its motion:

> "Martin cannot pursue a claim for breach of implied warranty of merchantability because it did not satisfy the mandatory notice requirements of Section 2-607. Martin never notified Jack Tuchten of any alleged *E. coli* contamination after the cilantro was delivered even after CDPH notified Martin of the outbreak in July 2016. Based on binding Illinois Supreme Court precedent in *Connick*, Martin cannot rely upon the filing of personal injury complaints against Jack Tuchten as a substitute for Martin's requirement to give notice to Jack Tuchten. It is undisputed that Martin never gave notice of an alleged defect to Jack Tuchten. The personal injury complaints filed nearly 24 months after the delivery of cilantro, even if considered as notice to Jack Tuchten, was not reasonable notice as a matter of law. Jack Tuchten is entitled to summary judgment because the evidence shows that Martin failed to satisfy the mandatory notice requirements of Section 2-607." (C2716.)

Jack Tuchten again raised the issue of timeliness of notice and actual knowledge on appeal. (A076.) Jack Tuchten cited the same law and made the same arguments in its appellate brief as it made in its motion for summary judgment. (A076.)

Even if the filing of the personal injury complaints are a proper basis for satisfying the actual knowledge exception, which Jack Tuchten denies, Jack Tuchten did not have actual knowledge of a defect with a reasonable time after delivery as required under the UCC. Martin's failure to address the timeliness argument on the merits is telling. An examination of the facts reveals the reason Martin fails to address timeliness under the actual knowledge exception. The first personal injury suit against Jack Tuchten was brought by Melissa Andrews in a third amended complaint on June 13, 2018. (C4234-4267.) The date of service of the third amended complaint is not contained in the record, but Jack Tuchten filed its appearance on July 25, 2018. (C52.) Under these facts, actual knowledge was untimely as a matter of law because it occurred approximately two years after Jack Tuchten's delivery of cilantro to Martin. As stated in Jack Tuchten's motion for summary judgment and appellate brief, notice is untimely as a matter of law where a buyer provided UCC notice of a defect to a seller fifteen months after delivery. *Branden v. Gerbie*, 62 Ill.App.3d 138, 141 (1st Dist. 1978).[2] Even when considering the personal injury complaints as a basis for satisfying the actual knowledge exception, Martin's breach of

[2] Martin also argues for the first time that Carbon's third-party complaint seeking contribution on complaints filed by personal injury plaintiffs is a basis for satisfying the actual knowledge exception. Martin waived this argument because it was not raised in the trial court. However, even considering this argument now, the alleged actual knowledge is untimely as a matter of law. Jack Tuchten was not served with the summons and third-party complaint until December 13, 2017. (C36.) Under this argument, actual knowledge was untimely because it occurred approximately eighteen months after Jack Tuchten's delivery of cilantro to Martin. *Branden*, 62 Ill.App.3d 138, 141.

warranty claim fails as a matter of law because the alleged actual knowledge was untimely as a matter of law.

G. Martin Waived Its Argument To Create A UCC Notice Exception For Third-Party Claims

Martin asks this Court to create an exception to the UCC notice requirement. Martin proposes an exception that exempts a merchant buyer from having to satisfy the UCC notice requirement when it is sued by a personal injury plaintiff. This exception would allow a merchant buyer to pursue a third-party action for breach of warranty without fear of the action being dismissed for its failure to provide UCC notice. Martin waived this argument because it was not raised in the trial court or appellate court. *Ryan*, 355 Ill.App.3d 342, 348; *Knupper*, 61 Ill.App.3d 884, 887.

H. This Court Should Not Create A UCC Notice Exception For Third-Party Claims

Even assuming Martin did not waive the argument, this Court should reject Martin's request to create a proposed exception for third-party claims. Martin cites no common law or legal basis for this proposed exception. The exception proposed by Martin must come from the legislature. Martin simply offers this proposed exception as yet another basis to excuse its failure to provide UCC notice. Rather than encourage non-compliance with the UCC notice provision, this Court should make clear that a merchant buyer will be foreclosed from pursuing a breach of warranty claim under the UCC unless it provides timely notice of a product defect to a merchant seller as required under Section 2-607(3)(a).

CONCLUSION

For the reasons set forth above, the Court should reverse the Appellate Court's decision reversing summary judgment in favor of Jack Tuchten and affirm the trial court's order granting summary judgment in favor of Jack Tuchten.

Respectfully submitted,

JACK TUCHTEN WHOLESALE PRODUCE, INC.

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RULE 341(C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 11 pages.

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NOTICE OF FILING AND PROOF OF SERVICE

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on January 17, 2025, we filed with the Clerk of the Supreme Court of Illinois, via File & Serve Illinois, the attached, **THIRD-PARTY DEFENDANT/APPELLANT, JACK TUCHTEN WHOLESALE PRODUCE, INC.'S REPLY BRIEF** in the above-referenced action, copies of which are hereby served upon you.

Dated: January 17, 2025

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CERTIFICATE OF SERVICE

Under penalties as provided by law under Section 1-109, of the Code of Civil Procedure the undersigned certifies that the statements set forth herein are true and correct that on January 17, 2025, I electronically filed a copy of the above **THIRD-PARTY DEFENDANT/APPELLANT, JACK TUCHTEN WHOLESALE PRODUCE, INC.'S REPLY BRIEF** referred to therein with the Clerk of the United States Supreme Court of Illinois, by using the File & Serve Illinois, and further certify that I served each party via email to the attorneys of record listed below:.

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