Nos. 123895 & 124002
(consolidated)

In the
Supreme Court of Illinois

PNEUMO ABEX LLC and OWENS-ILLINOIS, INC.,

*Defendants-Appellants*,

v.

JOHN JONES and DEBORAH JONES,

*Plaintiffs-Appellees.*

On Appeal from the
Appellate Court of Illinois, Fifth District, No. 5-16-0239
There on Appeal from the Circuit Court of Richland County, Illinois, No. 13-L-21,
The Honorable William C. Hudson, Judge Presiding

**MOTION OF THE ILLINOIS MANUFACTURERS' ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PNEUMO ABEX LLC AND OWENS-ILLINOIS, INC.**

Pursuant to Illinois Supreme Court Rules 345 and 361, the Illinois Manufacturers' Association and National Association of Manufacturers, respectfully request that this Court grant them leave to file the accompanying *amici curiae* brief in support of Defendants-Appellants Pneumo-Abex LLC and Owens-Illinois, Inc. In support of this Motion, Movants state as follows:

## I. Identity and Interest of the Proposed *Amici Curiae*

1. The Illinois Manufacturers' Association is the oldest, and one of the largest, state manufacturing trade associations in the United States. Founded in 1893, the IMA represents nearly 4,000 member companies and facilities in Illinois that employ 580,000 workers and

contribute the single largest share of the gross state product. The mission of the Illinois Manufacturers' Association is to advocate, promote, and strengthen the manufacturing sector in Illinois.

2. The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

## II. Reasons to Allow the Proposed *Amici* Brief

3. This Court has held that brief *amicus curiae* will ordinarily be allowed when presented by an individual or group that can provide the Court with "a unique perspective" that will assist the Court beyond the argument provided by litigants. *See Kingel v. Cingular Wireless, L.L.C.*, No. 100925, 2006 Ill. LEXIS 1, at *4 (Ill. Jan. 11, 2006).

4. The IMA served as *amicus curiae* in *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102 (1999), in which this Court defined the elements of a civil conspiracy claim and the evidence necessary to sustain such an action. *McClure* is central to the issue on appeal.

5. This Court has acknowledged that the IMA and NAM have a unique perspective may assist the Court in explaining the potential impact its rulings may have on Illinois manufacturers by granting them leave to file *amicus* briefs in many other cases. *See, e.g.*, *Nolan v. Weil-McLain*, 233 Ill.2d 416, 418 (2009); *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 521

(2008), *opinion modified on denial of reh'g* (Dec. 18, 2008); *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 310 (2006); *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 185 (2005); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 124 (2005).

6. The IMA and NAM respectfully submit that due to their role as the voice of the manufacturing community, their unique perspective will assist the Court in this case by explaining how the Fifth District's ruling, which reverses a trial court's dismissal of a civil conspiracy claim on summary judgment, is likely to impact businesses that make and sell products in Illinois.

7. First, the proposed brief discusses why civil conspiracy claims have the potential to impose a form of vicarious liability on innocent manufacturers for the actions of others and, for that reason, it is critical to maintain safeguards that constrain such actions.

8. Second, the brief shows that civil conspiracy claims fit into a broader pattern of plaintiffs' counsel seeking to extend concepts of vicarious liability and convert product liability claims into industry-wide litigation. The brief explains why the Fifth District's ruling, if not reversed, is likely to spur civil conspiracy claims against manufacturers not only in asbestos litigation, but also in a wide range of areas.

9. Finally, the brief indicates other potential adverse consequences of the Fifth District's relaxation of the standards for civil conspiracy claims, such as discouraging businesses from joining trade associations or engaging in joint research, and the potential for plaintiffs to use civil conspiracy claims as a means of forum shopping.

10. The answers to the questions raised in this appeal will have a direct and significant impact on IMA and NAM members.

11. Accordingly, the IMA and NAM respectfully submit that the attached brief will be beneficial in assisting the Court in understanding the significant impact that a ruling that relaxes the evidence necessary for a civil conspiracy to continue beyond a motion for summary judgment will have on manufacturers.

WHEREFORE, for the above stated reasons, the IMA and NAM respectfully request that the Court grant them leave to file the proposed brief, attached as Exhibit A.

Dated: February 1, 2019

Respectfully submitted,

/s/ William F. Northrip

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**Nos. 123895 & 124002**

**IN THE SUPREME COURT OF ILLINOIS**

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**[PROPOSED] ORDER**

IT IS HEREBY ORDERED that the motion of the Illinois Manufacturers' Association and the National Association of Manufacturers for leave to file a brief as *amici curiae* in support of Defendants-Appellees is:

[ ] granted / [ ] denied.

DATED: _____, 2019

_____

**Nos. 123895 & 124002**

**IN THE SUPREME COURT OF ILLINOIS**

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Hon. William C. Hudson, Judge Presiding

## NOTICE OF FILING AND CERTIFICATE OF SERVICE

The foregoing Motion of the Illinois Manufacturers' Association and National Association of Manufacturers for Leave to File a Brief as *Amici Curiae* in Support of Pneumo Abex LLC and Owens-Illinois, Inc. and proposed brief were filed electronically on February 1, 2019 with the Supreme Court of Illinois by electronic means. On that same day, I caused copies of the documents to be served via electronic mail upon the following counsel of record:

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Within five days of acceptance by the Court, the undersigned also states that he will cause thirteen copies of the Brief to be mailed with postage prepaid addressed to:

Clerk's Office – Springfield
Supreme Court Building
200 E. Capitol Avenue
Springfield, IL 62701

Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this notice of filing and certificate of service are true and correct.

/s/ William F. Northrip

E-FILED
2/1/2019 2:24 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

# EXHIBIT A

E-FILED
2/1/2019 2:24 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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## BRIEF OF *AMICI CURIAE* ILLINOIS MANUFACTURERS' ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PNEUMO ABEX LLC AND OWENS-ILLINOIS, INC.

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*National Association of Manufacturers*

## POINTS AND AUTHORITIES

## INTEREST OF *AMICI CURIAE*

The Illinois Manufacturers' Association is the oldest, and one of the largest, state manufacturing trade associations in the United States. Founded in 1893, the IMA represents nearly 4,000 member companies and facilities in Illinois that employ 580,000 workers and contribute the single largest share of the gross state product. The mission of the Illinois Manufacturers' Association is to advocate, promote, and strengthen the manufacturing sector in Illinois. The IMA served as *amicus curiae* in *McClure v. Owens Corning Fiberglas Corp*., 188 Ill.2d 102, 106 (1999), which is central to the issue on appeal. The ruling by the Fifth District seemingly contradicts this ruling and could result in recycled, and previously rejected, litigation against Illinois manufacturers.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

## STATEMENT OF THE ISSUE ADDRESSED BY *AMICI*

Whether the Fifth District erred in reversing a trial court's dismissal of a civil conspiracy claim on a motion for summary judgment where the trial court found Plaintiffs failed to present evidence beyond ordinary business communications and

parallel conduct from which a reasonable jury could find an underlying agreement to hide product hazards.

## ARGUMENT

### I. UNLESS PROPERLY CONSTRAINED, CIVIL CONSPIRACY CLAIMS COULD BE USED TO IMPOSE A FORM OF VICARIOUS LIABILITY ON ENTIRE INDUSTRIES

Unless closely defined and held to strict evidentiary standards, civil conspiracy claims have the potential to impose a form of vicarious liability on innocent manufacturers for the actions of others.

Civil conspiracy claims are unlike other tort actions. They impose joint liability on each participant in the wrongful act irrespective of whether the party was a direct actor and regardless of the degree of its responsibility. *See McClure v. Owens Corning Fiberglas*, 188 Ill.2d 102, 133 (1999) (recognizing that civil conspiracy claims extend liability "beyond the active tortfeasor to individuals who have not acted but have only planned, assisted, or encouraged the act" pursuant to an agreement); *see also* Norman L. Greene, *Civil Conspiracy and the Rule of Law: A Proposal for Reappraisal and Reform*, 64 Ark. L. Rev. 301, 340 (2011) ("Civil conspiracy permits remote defendants—including those that may have done very little—to be assessed with full liability as principal tortfeasors."). Defendants in conspiracy claims may be held fully liable for a plaintiff's injury when the primary tortfeasor is insolvent, immune from suit, or otherwise cannot be sued.

Civil conspiracy claims are particularly attractive for plaintiffs because they provide means to target businesses viewed as having "deep pockets," even when they have little or no connection to the plaintiff. *See* Greene, 64 Ark. L. Rev. at 341 (observing that "the main reason today for bringing a claim for civil conspiracy is collecting

damages from a deep pocket and remote defendant through a form of joint-and-several liability"). The very name of the tort, "conspiracy," entices plaintiffs to include it in a complaint because it suggests to jurors that a defendant was involved in nefarious activities. *See* Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. Miami L. Rev. 1, 45-46 (1999). Unless the cause of action is properly constrained, plaintiffs will attempt to use civil conspiracy claims to impose a form of vicarious liability on entire industries for the conduct of an individual actor.

Recognizing the potential for civil conspiracy claims based wholly on circumstantial evidence to impose liability on innocent parties, this Court has carefully defined the requirements of a claim. A civil conspiracy is "a combination of two or more persons for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means." *McClure*, 188 Ill.2d at 133 (quoting *Buckner v. Atlantic Plant Maintenance, Inc*., 182 Ill.2d 12, 23 (1998)). A critical element of a civil conspiracy claim is "an agreement and a tortious act committed in furtherance of that agreement." *Id*. (citing *Adcock v. Brakegate, Ltd*., 164 Ill.2d 54, 62-64 (1994)).

The Court has discouraged novel attempts to expand civil conspiracy claims through illustrating what types of conduct can constitute evidence of an agreement to participate in unlawful act. "Accident, inadvertent, or negligent participation" is not enough. *Id*. Nor does mere knowledge of the wrongful conduct of another render a person liable as a conspirator. *Id*. at 134. That one business conducted itself in a similar manner to another business—"parallel conduct"—is not proof of a conspiracy. *See id*. at 135-41. It may simply reflect the general business practices within a particular industry, consumer demand, or the state of science or technology at the time. *See id.* at 141 (recognizing

there are "many potential innocent explanations" for parallel conduct and that parallel conduct is "as consistent with innocence as with guilt"). A plaintiff must present clear and convincing evidence that a defendant understood the scheme, agreed to it, and acted to further those objectives. *Id*. at 134.[1]

Until now, Illinois courts have adhered to this precedent and held the line on civil conspiracy claims. Applying this Court's ruling in *McClure*, Illinois courts have uniformly rejected civil conspiracy claims in the asbestos context, finding plaintiffs had not presented sufficient evidence of conspiracy, beyond mere parallel conduct. *See Gillenwater v. Honeywell Int'l, Inc*., 2013 IL App (4th) 120929; *Rodarmel v. Pneumo Abex, LLC*, 2011 IL App (4th) 100463. The trial court acted in accordance with this settled law, but the Fifth District, despite any significant difference from these cases, found sufficient evidence to preclude summary judgment and require trial of the conspiracy claim.

## II. THIS COURT HAS SOUNDLY REJECTED ATTEMPTS TO RELAX STANDARDS TO IMPOSE INDUSTRY-WIDE LIABILITY

Observers recognize that civil conspiracy claims "fit into a broader pattern of plaintiffs' counsel seeking to extend concepts of vicarious liability" and convert product liability claims into industry-wide litigation. Mark A. Behrens & Christopher E. Appel,

[1] Courts in other states have also responded to the potential for civil conspiracy claims to become unmoored and unjustly impose liability by placing constraints on such actions. For example, some courts have not permitted civil conspiracy claims against an individual or business that lacks an independent duty to the plaintiff. *See, e.g*., *Applied Equip. Corp. v. Litton Saudi Arabia Ltd*., 869 P.2d 454, 459 (Cal. 1994) (limiting the extent to which defendants can "be bootstrapped into tort liability by the pejorative plea of conspiracy"); *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 612-17 (Tex. 1996) (rejecting conspiracy claim alleging tire manufacturer had engaged in conspiracy to conceal and obscure dangers of mismatched tires and wheels where manufacturer had not manufactured, distributed, or sold the product that caused plaintiff's injury).

*The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. Ill. U. L. Rev. 37, 39 (2010).

Plaintiffs have increasingly brought civil conspiracy claims not only in asbestos litigation, as here, but also in other product liability and toxic tort cases. *See generally* Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 Tenn. L. Rev. 383 (2007). In recent years, lawsuits against manufacturers of pharmaceuticals, lead-based paint, automobile parts, and gasoline additives, among others, have included conspiracy claims. *See id.* at 384-90. Now, conspiracy claims are included in some of the latest lawsuits attempting to shift responsibility to manufacturers for costs associated with climate change and opioid addiction.[2] These types of claims attempt to hold industries collectively responsible without satisfying the core product liability requirement that a manufacturer's product or action caused a plaintiff's harm.

This Court has not been receptive to invitations to expand liability in this manner. For example, in *Smith v. Eli Lilly & Co.*, 137 Ill.2d 222, 266-68 (1990), this Court rejected an attempt to impose liability on pharmaceutical makers based on their share of the market for a particular prescription drug, diethylstilbestrol (DES), regardless of whether a specific manufacturer's drug caused a particular plaintiff's injury. The Court understood that imposing liability in this way violates the principle that manufacturers are not "insurers of their industry." *Id*. at 266. Rather, "a logical limit must be placed on the

[2] *See, e.g.,* Complaint, *City of Harvey v. Purdue Pharma L.P.*, No. 2018CH09020 (Cook County Cir. Ct. filed July 19, 2018) (alleging civil conspiracy claims in opioid lawsuit brought by Illinois cities and villages); Charlie Brennan, *Boulder County and Boulder Add 'Civil Conspiracy' to Climate Change Lawsuit*, Daily Camera, June 20, 2018, http://www.dailycamera.com/news/boulder/ci_31958210/boulder-county-civil-conspiracy-climate-lawsuit-exxon.

scope of a manufacturer's liability." *Id*. at 266-67. While the plaintiffs chose not to appeal the lower courts' dismissal of their other attempts to circumvent causation through alleging civil conspiracy, concert of action, enterprise liability, or alternative liability in that case, the Court recognized that each of these theories had been "soundly rejected" by other courts in DES litigation. *Id*. at 235. Likewise, here, an unsupported civil conspiracy claim does not provide basis for satisfying basic elements of a product liability action.

## III. AN EXPANSIVE APPROACH TO CIVIL CONSPIRACY CLAIMS WILL DISCOURAGE BENEFICIAL CONDUCT AND ATTRACT MORE LITIGATION TO ILLINOIS

The Fifth District's relaxation of the evidence required to support a civil conspiracy claim is troubling for Illinois manufacturers. Because of this ruling, manufacturers are now more likely to face lengthy, expensive litigation where their product and conduct did not cause harm and the business may only be remotely connected to the litigation.

This open door to civil conspiracy claims may adversely affect manufacturers in other ways. Relaxing the standard for viable civil conspiracy claim may discourage manufacturers from entering trade associations or jointly conducting or funding research, as these types of legitimate, beneficial arrangements could be used as a predicate for significant liability. *See* Behrens & Appel, 31 N. Ill. U. L. Rev. at 65-66.

In addition, plaintiffs may assert civil conspiracy claims to bring lawsuits from across the country in Illinois courts that they perceive as favorable to their clients. Plaintiffs have long used conspiracy claims in attempts to establish personal jurisdiction on the basis that a tangentially connected party is located in the state. *See generally* Stuart M. Riback, *The Long Arm and Multiple Defendants, The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 507 (1984); Ann Althouse, *The Use of*

*Conspiracy to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983). This is of rising concern as the U.S. Supreme Court has limited the ability of plaintiffs to bring actions against businesses outside where they are incorporated or have their principal place of business unless the forum has a specific connection to the conduct or injury at issue. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.,* 137 S. Ct. 1773 (2017). Asserting that a local Illinois manufacturer, product seller, or trade association participated in a civil conspiracy may open the door to filing more mass tort litigation in this state. *See* Tucker Blaser & Bryce Pfalzgraf, *The Evolution of Conspiracy Personal Jurisdiction*, Law360, Sept. 28, 2018, https://www.law360.com/articles/1087110/the-evolution-of-conspiracy-personal-jurisdiction; *see also* Ausness, 74 Tenn. L. Rev. at 407 (discussing use of civil conspiracy claim to obtain jurisdiction over non-resident defendant). This has occurred in Illinois. *See Cameron v. Owens-Corning Fiberglas Corp*., 296 Ill. App. 3d 978, 988-89 (1998) (finding well-pled civil conspiracy claim provided basis for personal jurisdiction over British company). As certain jurisdictions in Illinois are already epicenters for particular types of litigation,[3] permitting a relaxed approach to civil conspiracy claims is likely to draw more litigation arising outside Illinois to the state. This litigation will unduly burden both local businesses and the courts.

[3] *See* KCIC, Asbestos Litigation: 2017 Year in Review (2018), https://www.kcic.com/asset/pdf/KCIC-2017-AsbestosReport.pdf (finding Madison County, Illinois is the most popular jurisdiction for asbestos litigation in the country, and that St. Clair County and Cook County placed fifth and eighth, respectively).

## CONCLUSION

For these reasons, the Illinois Manufacturers' Association and National Association of Manufacturers respectfully request that this Court reverse the judgment of the Fifth District.

Dated: February 1, 2019

Respectfully submitted,

/s/ William F. Northrip

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## 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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service is 2,048 words.

/s/ William F. Northrip