No. 13-0042

IN THE SUPREME COURT OF TEXAS

GENIE INDUSTRIES, INC.,

Petitioner,

v.

RICKY MATAK, BELINDA MATAK,
AND MISTY SONNIER AS REPRESENTATIVE OF THE
ESTATE OF WALTER PETE LOGAN MATAK, DECEASED,

Respondents.

On Petition for Review from the Thirteenth Court of Appeals
Corpus Christi-Edinburg, Texas, No. 13-11-00050-CV

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION IN SUPPORT
OF PETITIONER GENIE INDUSTRIES, INC.**

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INTEREST AND IDENTITY OF AMICUS

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing the views of supporters nationwide who believe in limited government and individual rights. PLF's Free Enterprise Project engages in litigation in cases affecting America's economic vitality, and has filed amicus briefs in cases involving the expansion of civil liability in this Court. *See, e.g., Centocor, Inc. v. Hamilton*, 372 S.W.3d 140 (Tex. 2012); *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009); *New Texas Auto Auction Services, L.P. v. Gomez de Hernandez*, 249 S.W.3d 400 (Tex. 2008).

In addition, PLF attorneys have published articles on the effects of tort liability on the business community. *See, e.g.*, Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). PLF attorneys are familiar with the issues presented here and believe that its public policy perspective and experience will provide a useful additional viewpoint. PLF specifically highlights the public policy implications of the lower courts' decisions, and points out persuasive authority in other jurisdictions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Apprentice electrician Walter Matak was injured when he, his more experienced supervisor, and other jobsite personnel flouted verbal and visual warnings, deliberately disassembled the safety mechanisms on an industrial lift, and proceeded to push Matak—raised 40 feet in the air—around a room. *Genie Indus., Inc. v. Matak*, No. 13-11-00050-CV, 2012 WL 6061779, at *1 (Tex. App.–Corpus Christi-Edinburg Dec. 6, 2012). As a natural consequence of their actions, the lift tipped over—causing Matak to fall and suffer fatal harm. *Id.* A jury found Genie liable for Matak's injuries, and the appellate court affirmed. *Id.* at *7.

This was wrong. As cases from Texas and other jurisdictions establish, a manufacturer cannot be held liable for injuries that arise from a person's decision to misuse a product in an obviously dangerous manner and against manufacturer warnings. This approach is not only legally sound, it advances important fairness and efficiency policies. For instance, it helps ensure that (1) manufacturers do not waste time and money trying to achieve an unrealistic level of safety before marketing useful products, and (2) those truly at fault for injuries bear the cost of their actions. David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 Notre Dame L. Rev. 427, 457 (1993). The decisions below should be

reversed because they contravene these important public policy considerations, as well as controlling legal precedent.

The lower court decisions also erred in permitting the plaintiff to prove that a safer alternative product design existed (and thus, that the manufacturer was liable for a product defect) by pointing to a design that violates prevailing safety standards. *Genie Indus.*, 2012 WL 6061779, at *5. A product that violates statutory safety standards is by definition less safe than one that complies. *Compare* Tex. Civ. Prac. & Rem. Code Ann. § 82.008 (imposing rebuttable presumption that a manufacturer is not liable for injuries that result from a product that complies with federal safety standards), *with Brownstone Park Ltd. v. S. Union Gas Co.*, 537 S.W.2d 270, 274 (Tex. Civ. App.–Austin 1976) (The "violation of a legislative enactment" can be "negligence in itself."). It would be an absurdity to hold a manufacturer liable because it chose a design that complies with safety regulations instead of one that does not. This Court should clarify that a plaintiff cannot introduce a product that would violate safety standards as evidence of a "safer alternative design."

ARGUMENT

I

THE PLAINTIFF'S MISUSE OF THE LIFT WAS NOT FORESEEABLE

A. Under Texas Law, Misuse in Contravention of Warnings and Despite Obvious Danger Is Not Foreseeable

Even under the theory of strict liability, manufacturers are not insurers of their goods. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 423 (Tex. 1984). They need not make their products completely safe, but only ensure that their products are not "unreasonably dangerous." *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 870 (Tex. 1978). A long-standing limit on manufacturer liability is that producers are not expected to guard against unforeseeable consumer misuse of their products. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349 (Tex. 1977), *overruled on other grounds by Duncan*, 665 S.W.2d 414. This limit on liability protects producers from being held responsible for accidents that are outside of their control, or more fairly attributed the consumer. *Boatland of Houston v. Bailey*, 609 S.W.2d 743, 750-51 (Tex. 1980) (Pope, J., concurring).

For example, in *Timpte Industries, Inc. v. Gish*, this Court held that the manufacturer was not liable when the plaintiff fell off of the top rail of a trailer, because "[h]ad [he] adhered to [the safety manual's] warning, his accident would not have happened." 286 S.W.3d 306, 314 (Tex. 2009). Any risk of injury stemmed not

from the inherent dangerousness of the product, but "from the risk that a user [would] ignore both Timpte's warnings and open and obvious dangers." *Id.*; *see also Hopkins*, 548 S.W.2d at 349 ("We cannot charge the manufacturer of a knife when it is used as a toothpick and the user complains because the sharp edge cuts."). Under these circumstances, there is no defect, only dangerous misuse that manufacturers cannot be expected to guard against.

In the context of tort law, courts' reluctance to hold producers liable for injuries arising from unforeseeable product misuse relates back to the issue of causation. *Id.* When a person egregiously misuses a product, he breaks the chain of causation and becomes the intervening cause of the accident. *Timpte*, 286 S.W.3d at 314. Because products might be misused in myriad different ways, and because a jury might deem any and all of those misuses foreseeable in hindsight, it is important that courts police this limit carefully. And indeed, state courts, including this one, have regularly done so. *See, e.g.*, *Duncan*, 665 S.W.2d at 423 (limiting liability to foreseeable misuse); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 257 (Tex. 1999) (same); *Sims v. Washex Mach. Corp.*, 932 S.W.2d 559, 562 (Tex. App.–Houston [1st Dist.] 1995) (same).

B. Out of State Precedent Supports the *Timpte* Rule

The rule announced in *Timpte*—that a plaintiff's unsafe behavior can mean that a product was not defectively designed as a matter of law—is consistent with cases

in other jurisdictions, and reflects a proper balancing of the public policies that underlie tort law:

> [N]o product can be made safe for every purpose, manner, or extent of use. Considerations of cost and practicality limit every product's range of effective and safe use, which is a fundamental fact of life that consumers readily understand. Consumers know that products may be used safely only for certain limited purposes, that they should be used properly and within the manufacturer's warnings and instructions, and that the use of a product beyond its capabilities may cause it to break, overheat, or otherwise fail in a possibly dangerous way. If a user chooses to put a product to a type or manner of use that the product cannot fairly be expected to withstand, and the user is injured as a result, he or she cannot reasonably demand that the manufacturer (and, indirectly, other consumers) shoulder the economic consequences of the loss.

David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. Rev. 1, 46 (2000) (footnote omitted).

In *Kline v. ABCO Engineering Corp.*, 991 F. Supp. 747, 750-51 (D. Md. 1997), a district court refused to hold the manufacturer liable under Maryland law for injuries that resulted after the plaintiff deliberately inserted his entire forearm into a conveyor machine. He had read the safety manual, which stated that the machine should be shut down during maintenance, and the product included warning stickers showing a picture of a hand caught between the machine's internal rollers. *Id.* at 749. Nonetheless, the plaintiff stuck his arm into the machine to loosen a caught roller, resulting in severe injuries. The court held that, given the plaintiff's refusal to follow the warnings and the obviousness of the risk, his misuse was not foreseeable. *Id.* at

750-51. The plaintiff's deliberate actions were an "intervening cause that relieve[d] the manufacturer[] of liability" as a matter of law. *Id.* at 751.

Likewise, in *Erkson by Hickman v. Sears, Roebuck & Co.*, 841 S.W.2d 207, 209 (Mo. Ct. App. 1992), the court held that the plaintiff's decision to act against warnings and in an obviously dangerous manner was not a foreseeable misuse. The owner of a lawn mower attached a box to the side of the mower for his pet. *Id.* at 208-09. On one occasion, his wife put a child inside it for a ride around the lawn. *Id.* The mower caught on a stump, the child fell out, and the blades ran over her leg. *Id.* The fact that the product manual specifically warned against using the machine near children, and that the risk of injury when using the mower as a "motorized baby buggy" was so obvious, meant that no one "could or should have" anticipated that someone would misuse it in such an extraordinary and dangerous manner. *Id.* at 210-11; *see also Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Or. 1973) ("Misuse" that is "so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it" is one which the manufacturer "need not anticipate and provide for."); *Daniell v. Ford Motor Co.*, 581 F. Supp. 728, 731 (D.N.M. 1984) (manufacturer not liable where the plaintiff attempted to commit suicide by shutting herself in a car trunk that lacked a release latch, but changed her mind and was stuck inside for several days); *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) (manufacturer not liable where boy threw empty bottle

against pole and shattered glass flew into his eye because "deliberate misuse of an otherwise reasonably safe container" is not foreseeable).

In *Stewart v. Von Solbrig Hospital, Inc.*, 321 N.E.2d 428, 432 (Ill. App. Ct. 1974), the court found that the manufacturer of a steel pin was not liable when a patient walked with the pin in his leg with his full weight—against his doctor's orders—because the injury "had nothing to do with the pin's failure to perform." *Id.* Instead, it was a result of the patient's deliberate decision to ignore his doctor. *Id.*; *see also Sisco v. Broce Mfg., Inc.*, 1 Fed. App'x 420, 423 (6th Cir. 2001) (employer's deliberate decision not to maintain highway sweeper in contravention of warnings was intervening cause in plaintiff's death); *Kampen v. American Isuzu Motors, Inc.*, 157 F.3d 306, 309 (5th Cir. 1998) (en banc) (applying Louisiana law and barring plaintiff's claim when he failed to read instructions in manual and spare tire compartment not to "get beneath the car" and was crushed because jack supporting car collapsed).

This is a recurring theme throughout products liability law across the United States; a manufacturer's warning, in conjunction with the obviousness of the risk, puts users on notice of the danger. *See* Richard C. Ausness, *When Warnings Alone Won't Do: A Reply to Professor Phillips*, 26 N. Ky. L. Rev. 627, 633 (1999). Both make the injury unlikely to occur. And where a person proceeds despite those explicit warnings

and in the face of that obvious risk, the cause of the injury is the injured person himself.

C. The Plaintiff's Misuse Was Not Foreseeable in This Case

In the present case, the plaintiff permitted co-workers to remove the safety stabilizers while the lift was fully extended, 40 feet in the air, and to push it around the room with him perched on a small platform. *Genie Indus.*, 2012 WL 6061779, at *1. Visual warnings attached to the lift made clear to any user that the stabilizers must remain in place while the lift was extended. The safety manual included similar warnings. Moreover, the risk of injury from falling off a destabilized, elevated lift would be apparent to anyone.

As in *Timpte*, any risk of injury under these circumstances "stem[med] only from the risk that a user will ignore both [the manufacturer's] warnings and open and obvious dangers," 286 S.W.3d at 314—risks outside of Genie's control. Genie could never be sure that the plaintiff would heed its warnings, but it was entitled to assume that a reasonable consumer would do so. *See Hutchins v. Silicone Specialties, Inc.*, 881 P.2d 64, 67 (Okla. 1993) (manufacturer not required to foresee that professional users of product would ignore warnings and then use product in exact manner warned against); *Hood v. Ryobi America Corp.*, 181 F.3d 608, 611 (4th Cir. 1999) ("[C]lear and unequivocal" warnings were "sufficient to apprise the ordinary consumer that it is unsafe to operate a guardless saw—warnings which, if followed, would have

prevented the injury."). Therefore, Genie could not foresee the plaintiff's dangerous misuse, and the lower court was wrong to hold otherwise.

II

HOLDING MANUFACTURERS LIABLE IN CASES OF EGREGIOUS MISUSE UNDERMINES FAIRNESS AND EFFICIENCY

Excluding liability when the plaintiff misuses a product in violation of explicit warnings and in an obviously dangerous manner furthers several core policies that underlie products liability law—like balancing safety with utility, incentivizing safe conduct, and promoting fairness and autonomy. A rule requiring manufacturers to bear the cost of deliberate and egregious product misuse would result in overly safe products at the expense of utility, encourage careless behavior, and force consumers to bear the costs of other individuals' irresponsible actions.

A. Courts Should Balance Safety and Efficiency

Improvements in safety have trade-offs. Users may encounter less risk of injury, but the product itself will often have more limited utility, and cost more. While a product can almost always be made safer by the addition of more safeguards, stronger materials, failsafes, etc., such stops will always make the product more expensive, will increase scarcity (which in the long run may decrease overall safety), and may discourage consumers from taking warnings seriously, if they come to view these safeguards as overkill. In other words, "[s]ociety does not benefit from products

that are excessively safe." Restatement (Third) of Torts: Prod. Liab. § 2 cmt. a; *cf. Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 385 (Tex. 1995) (Products liability law in Texas does not "impose liability in such a way as to eliminate whole categories of useful products from the market.").

Holding manufacturers liable in cases of egregious consumer misuse would force producers to make their "products safe for the least apt, and unintended," and "hold other users hostage to the lowest common denominator." *Hernandez*, 2 S.W.3d at 260. In *Wheeler v. HO Sports Inc*., 232 F.3d 754, 758 (10th Cir. 2000), for example, the court observed that a life vest was not defectively designed when it included only 7.1 pounds of floatation, rather than the 10 pounds necessary to keep afloat an average person, because the vest "was designed for use by experienced, skilled wakeboarders," who are "willing to forego some degree of floatation for the sake of enhanced mobility." In other words, more knowledgeable wakeboarders were entitled to choose between products with different levels of safety, rather than be stuck with a less useful, but safer product. Wise public policy will avoid tort law that over-deters useful but risky products "to the net detriment of society." Owen, *The Moral Foundations*, *supra* at 484.[1]

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[1] In the future producers may not only forego creating lifts like Genie's, but valuable new medicines and treatments. *Id.*; Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277, 285-90 (1985) (discussing how excessive tort liability has hampered the production of (continued...)

Further, the decision below contravenes the efficiency-oriented products liability principle that the party who is able to foresee the risks of harm and guard against them at the least cost should be liable for that harm. Ausness, *supra* at 640. Placing liability on the party who can avoid the risk of harm at the least cost (typically called a least cost avoider) is an efficient way of incentivizing safer products. But the manufacturer is not always the least cost avoider. At the outset, the consumer "is free to choose whether or not to purchase a product in the first place." La Fetra, *Freedom, Responsibility, and Risk*, *supra* at 670. And following purchase, "the consumer exercises control over the product, choosing whether to follow (or even whether to read) the instructions and warnings that accompany it." *Id.* Holding users liable when they flout warnings and proceed in the face of obvious danger provides consumers with the proper incentives to behave prudently when they are able to do so. *See* W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 Am. L. Rev. 573, 585 (1990).

Where courts ignore that policy in favor of cost-spreading, they do consumers a disservice, as courts are an inefficient provider of social insurance. *See, e.g.*, William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. Tex. L. Rev. 227, 250 (1995) (explaining how cost-spreading increases

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[1] (...continued)
life-saving drugs including the whooping cough vaccine); John Cohen, *Is Liability Slowing AIDS Vaccines?*, 256 SCI., Apr. 10, 1992, at 168.

prices, reduces the availability of insurance, and entails high transaction costs); *see also* Viscusi, *supra* at 590 (noting that with the expansion of health insurance and other forms of insurance, "concern has shifted to dealing with overinsurance" rather than underinsurance). Lawsuits often entail long waits, after which a plaintiff may receive no reward at all or, more likely, a settlement for less than the desired amount. *Id.* at 586. Nevertheless, this Court has rejected cost-spreading as the sole purpose of products liability law. *Duncan*, 665 S.W.2d at 424.

B. Courts Should Not Impose Liability Where It Is Unfair To Do So

From a fairness perspective, it is fundamentally unjust to hold manufacturers liable for risks outside of their control. *See* Owen, *Products Liability: User Misconduct Defenses*, *supra* at 55 ("If there is common thread in the decisions on the meaning of the 'foreseeability' limitation to product uses, it is one of limiting a seller's responsibility to uses that are *fair*."). While employers can monitor their employees' behavior at work—giving some justification for enterprise liability in that context—the same cannot be said of the relationship between producers and consumers. *See* Viscusi, *supra* at 587.

It is also unfair to force responsible consumers of the same products to subsidize the irresponsible acts of others. *Bailey*, 609 S.W.2d at 750 ("[T]he general consumer should not have to pay additionally for that percentage of the loss that was caused by the plaintiff's own fault."); *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584,

594 (Tex. 1999) ("Public policy favors reasonable conduct by consumers regardless of whether a product is defective."). By turning tort law into social insurance, courts force consumers to pay for "types and levels of insurance" that they "neither need nor want, and at excessive cost." David G. Owen, *Design Defect Ghosts*, 74 Brook L. Rev. 927, 957 (2009). Such a "tort tax" acts regressively on poorer populations; because the "premium" is determined by reference to the average loss, low-income consumers end up paying more than their average expected loss. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1559 (1987).

Finally, limiting liability to cases where the product is actually defective, not merely capable of being egregiously misused, underscores the fact that "manufacture and use of products is in general good. As a form of property, products generally promote the autonomy of both their makers and their users." Owen, *The Moral Foundations*, *supra* at 459 (footnote omitted). Limiting liability in the case of unforeseeable misuse furthers individual responsibility by allowing individuals to take responsibility for their choices when harm results from them. And calling products "defective" merely because one consumer used a product dangerously will restrict consumer choice. "Consumers are entitled to consider the risks and benefits of the different designs and choose among them," *Hernandez*, 2 S.W.3d at 259.

In short, "[t]here is simply no social or economic benefit to be gained by giving large damage awards to product users who fail to follow simple instructions or heed clear warnings," especially when the risk of injury is apparent. Ausness, *supra* at 628.

III

A MANUFACTURER NEED NOT ADOPT A DESIGN THAT VIOLATES PREVAILING SAFETY STANDARDS

In order to prove a design defect, a plaintiff must prove both that a product is unreasonably dangerous, and that a safer alternative design exists that would have significantly reduced the risk of injury without substantially reducing the product's utility. *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a)-(b); *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 605 (Tex. App.–Houston [1st Dist.] 2003); *Sanchez*, 997 S.W.2d at 588. Such a design must have been "both technologically and economically feasible when the product left the control of the manufacturer." 104 S.W.3d at 605.

The lower court erred in holding that there was an issue of material fact as to whether the plaintiff could prove the existence of a safer alternative design with regard to the automatic drop down proposal because that design violates controlling safety standards. Pet. Br. 33-34. This Court should clarify that any design that violates safety standards cannot, as a matter of law, be considered a reasonable alternative.

First, a "safer" alternative design should not "introduce[] into the product other dangers of equal or greater magnitude." Restatement (Third) of Torts: Prod. Liab. § 2 cmt. f; *see also Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 337 (Tex. 1998). By the government's own determination, a design that violates prevailing safety standards is unsafe—so much so that the government felt compelled to outlaw it. Unsurprisingly, compliance with OSHA regulations has frequently been used in Texas courts as evidence that the manufacturer designed a safe product, not an unsafe one. *See, e.g.*, *Shears*, 911 S.W.2d at 385; *Costilla v. Crown Equip. Corp.*, 148 S.W.3d 736, 740 (Tex. App.–Dallas 2004); *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.–San Antonio 1996).

Second, it is perverse that under the guise of promoting safety, the law would force manufacturers to adopt designs that affirmatively violate established safety standards. In general, Texas law seeks to encourage manufacturers to comply with these standards. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 82.008 (imposing rebuttable presumption that the manufacturer/seller is not liable for an injury caused by a product complies with federal safety standards).[2]

[2] Many other states have enacted similar laws. *See, e.g.*, Colo. Rev. Stat. § 13-21-403; Kan. Stat. § 60-3304; Tenn. Code Ann. § 29-28-104; Ind. Code § 34-20-5-1; Mich. Comp. Laws Ann. § 600.2946; Utah Admin. Code § 78B-6-703; N.D. Cent. Code § 28-01.3-09; Wash. Rev. Code Ann. § 7.72.050; Ark. Code Ann. § 16-116-105.

Moreover, if Genie were to adopt a design that flouted government-established safety standards, it might be liable for negligence per se. *See S. Pac. Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (adopting a government regulation as defining the standard of conduct of a reasonable person, and defining violation thereof as negligence per se). Thus, allowing plaintiffs to introduce designs that violate safety standards as evidence of a safer alternative product would put defendants in the impossible position of having to decide whether to pick a design which may cause them to be liable under the theory of negligence per se, or having their choice not to use that design be used against them as evidence that the chosen design is unreasonably dangerous.

This Court should therefore hold that a design that violates prevailing safety standards cannot be a reasonable alternative design.

CONCLUSION

For the following reasons, the decision below should be reversed.

DATED: July 31, 2014.

Respectfully submitted,

/s/ J. David Breemer
J. DAVID BREEMER

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, the foregoing amicus brief was forwarded to all counsel of record by the Electronic Filing Service Provider, if registered, otherwise by email, as follows:

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CERTIFICATE OF COMPLIANCE

1. In compliance with Tex. R. App. P. 9.4, this amicus brief contains 4,003 words excluding the parts of the brief exempted by Ruly 9.4(i)(1).

2. In compliance with Tex. R. App. P. 9.4(e), this amicus brief has been prepared in a proportionally spaced typeface in 14 point Times New Roman font.

DATED: July 31, 2014.

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