STATE OF MICHIGAN
IN THE SUPREME COURT

KIRK SCOTT PEDERSON,

Plaintiff-Appellee,

v.

MEIJER STORES, INC.,

Defendant-Appellant.

and

MACTEC, INC., MACTEC ENGINEERING & CONSULTING, INC.; AMEC E&I, INC., AMEC E&I HOLDINGS, INC., AMEC ENVIRONMENT & INFRASTRUCTURE, INC., SINOCHEM; SINOCHEM NINGBO CO., LTD.; JARDER OUTDOOR NINGBO CO., LTR., SINOCHEM INTERNATIONAL; NINGBO TEXTILES; NINGBO TEXTILES IMP. & EXP. CORP.; HAIJIN METAL PRODUCTS, LTD.; MR. QIAN JUN; SINCOCHEM GROUP; AND SINOCHEM CORPORATION,

Defendants.

Michigan Supreme Court No. 156475

Court of Appeals No. 328855

Wayne County Circuit Court
Case No. 14-141798-NO
Hon. Sheila Gibson

BRIEF OF AMICUS CURIAE RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT-APPELLANT MEIJER STORES, INC.'S APPLICATION FOR LEAVE TO APPEAL

KERR, RUSSELL AND WEBER, PLC
Joanne Geha Swanson (P33594)
Attorneys for Amicus Curiae
Retail Litigation Center, Inc.
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT OF QUESTION PRESENTED

Should this Court grant leave to appeal and ultimately reverse the Court of Appeals' decision in *Pedersen v Meijer* because, contrary to the Legislature's intent to limit the liability of non-manufacturing sellers with the enactment of MCL 600.2947(6) and MCL 600.2948, *Pedersen* assigns a duty to non-manufacturing sellers to determine whether a product in open packaging, or without packaging, requires and includes on-product warnings and instructions known to the manufacturer?

STATEMENT OF INTEREST OF AMICUS CURIAE RETAIL LITIGATION CENTER, INC.

Amicus Curiae Retail Litigation Center, Inc. (RLC), supports the application of Defendant-Appellant Meijer Stores, Inc., for leave to appeal the Michigan Court of Appeals' decision in *Pedersen v Meijer Stores, Inc*., because the decision improperly interprets MCL 600.2948(4) and MCL 600.2947 as imposing a duty on a non-manufacturing seller to determine whether a product in open packaging or without packaging requires on-product warnings and instructions regarding hazards known to the manufacturer. The ruling is contrary to the warnings and instructions provision of MCL 600.2948(3) and the limitation on non-manufacturing sellers' liability intended by MCL 600.2947(6). *Pedersen v Meijer Stores, Inc*, unpublished opinion per curiam of the Court of Appeals dated August 3, 2017 (Docket No. 328855).

The duty recognized by the Court of Appeals is a slippery slope which ultimately places non-manufacturing sellers in the role of manufacturers for the purpose of determining whether, and what, warnings and instructions are necessary for product safety. Non-manufacturing sellers lack the technical, scientific, and medical knowledge necessary to make these decisions and do not have the practical ability to physically inspect each open product to determine whether it contains appropriate warnings and instructions.

Particularly in the context of items that have become separated from their packaging as display models, customer returns, or clearance, the burden is immense. A non-manufacturing seller is not in a position to know whether, as originally packaged, a returned product or display model at one time contained warnings or instructions that are no longer affixed to, or included with, the product. This is particularly so in a self-serve retail environment where customers self-select items off the shelf and proceed to checkout without the interaction or advice of store personnel.

Amicus Curiae Retail Litigation Center, Inc. ("RLC") is a public policy organization that represents the interests of its members in legal proceedings that affect the retail industry. The RLC seeks to provide courts with the retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases. The RLC's members include many of the country's largest and most innovative retailers. RLC members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales.

The duty imposed by the *Pedersen* case is of significant concern to RLC and its members. For reasons more fully explained below, RLC joins Meijer in urging this Court to grant the application for leave to appeal and peremptorily reverse or reverse after full appeal the erroneous decision in *Pedersen*.[1]

ARGUMENT

I. This Court Should Reverse *Pedersen*, Which Expands the Liability of Non-Manufacturing Sellers and Imposes a Duty They Are Not Technically or Practically Equipped to Assume.

The underlying issue raised by this appeal is whether a non-manufacturing seller has a duty to determine whether the products it sells require and include on-product warnings and instructions to address hazards known to the manufacturer. The product here was a hunter's tree stand separated from its packaging and instructions as either a display model or return, and allegedly sold by Meijer as a clearance item. Mr. Pedersen testified to having purchased the tree stand nearly eight years before his injury. He had installed and taken down the tree stand at least five times, and admitted to having used at least 10 other tree stands over the years. Mr. Pedersen acknowledged that he would likely not have read the instructions had they been included with the product although he

[1] Amicus Curiae relies upon the Statement of Facts set forth in Meijer's Application for Leave to Appeal.

might have looked at an on-product warning. He nonetheless alleges that Meijer had a duty to warn him not to leave the tree stand erected in the tree from one season to the next because as trees grow, stress is placed on the brackets and they could break. There was no evidence that such a warning was included in the original packaging but the *Pedersen* court concluded that Meijer's failure to sell the product with the manufacturer's instructions and on-product warnings was predicated on Meijer's own actions and was therefore actionable under MCL 600.2948(4).

Historically, common law principles governed a seller's duty to warn of material risks in products. However, effective in 1996, the Legislature enacted tort reform legislation that displaced the common law of products liability. Since then, MCL 600.2947(6) has limited the duty of a non-manufacturing seller, providing:

> (6) In a product liability action, *a seller other than a manufacturer is not liable for harm allegedly caused by the product unless* either of the following is true:
>
> (a) The *seller failed to exercise reasonable care*, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.
>
> (b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm [*Id.* (emphasis added).

An action based upon a failure to exercise reasonable care must be premised upon an existing legal duty. The Legislature intentionally limited the scope of a non-manufacturing seller's duty with the enactment of MCL 600.2947(6). As the Court explained in *Mills v Curioni, Inc*, 238 F Supp 2d 876, 886-887 (ED Mich 2002):

> The legislative history of Section 2947 reveals *the Legislature's intent to limit the liability of sellers only to those cases where their independent negligence* is shown. The Senate Fiscal Agency's report on the product liability measures of Michigan's tort reform legislation explains:

> By holding sellers responsible for their own wrongdoing, the bill would eliminate unnecessary and burdensome legal costs and insurance premiums. Since manufacturers ultimately indemnify sellers for the harm caused by the manufacturers' own products, claims should be brought directly against them.
>
> [Senate Fiscal Agency Analysis of S.B. 344, p. 10.] [238 F Supp 2d at 886-887 (emphasis added)].

See also, *Curry v Meijer, Inc*, 286 Mich App 586, 592; 780 NW2d 603 (2009) ("MCL 600.2947(6)(a) and (b) clearly and unambiguously predicate product liability on a nonmanufacturing seller for harm allegedly caused by the product under only two scenarios: (a) where the seller fails to exercise reasonable care, or (b) where there is a breach of an express warranty"); *Jacobs v Tricam Industries, Inc*, 816 F Supp 2d 487, 495 (ED Mich 2011) ("By state statute, sellers who are not manufacturers of the product are *immune* from product liability unless (i) the seller failed to exercise reasonable care and such failure was the proximate cause of the plaintiff's injury, or (ii) the seller breached an express warranty," citing MCL 600.2957(6) (emphasis added)).

Importantly, in granting summary judgment to the defendant retailer in *Mills*, the Court explained that "a seller's duty under Section 2947 is based on *whether it knew or should have known of the alleged danger*." *Id*. at 887 (emphasis added). Similarly, in *Coleman v Maxwell Shoe Co, Inc*, 475 F Supp 2d 685, 690-691 (ED Mich 2007), the Court observed that one aspect of the tort system that the Legislature "specifically intended to modify" was to establish "a fault-based standard of liability for non-manufacturing product sellers." See also, *Konstantinov v Findlay Ford Lincoln Mercury*, 619 F Supp 2d 326, 332-333 (ED Mich 2008) ("non-manufacturing sellers can be held liable for breach of implied warranty only if it is shown that they failed to exercise reasonable care, that is, that *they knew or had reason to know of the alleged*

defect") (emphasis added). Liability no longer attaches upon the mere showing of a defect and resulting injury.[2]

By statute, culpability for a failure to warn or instruct depends upon the "scientific, technical, or medical information reasonably available at the time the specific unit of the product left the control of the manufacturer." The relevant provision is contained within MCL 600.2948(3) and does not embrace a non-manufacturing seller. The statute provides:

> (3) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, a manufacturer or seller is not liable unless the plaintiff proves that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information reasonably available at the time the specific unit of the product left the control of the manufacturer.

In an apparent tacit acknowledgement that this failure to warn/instruct provision cannot apply to a non-manufacturing seller, *Pedersen* concluded that liability could instead attach under MCL 600.2948(4), which provides:

> (4) This section does not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product has left the manufacturer's or seller's control.

Pedersen reasons that "The theory of liability does not impose a duty to warn on Meijer, but rather permits a jury to consider whether Meijer failed to exercise reasonable care when it sold an inherently dangerous product without the component materials that were included in the original package," a theory "contemplated by the provisions of MCL 600.2948(4)," *Pedersen*, slip op. at

---

[2] "Before 1996, it was settled in Michigan that a plaintiff was not required to establish negligence to recover under a breach of implied warranty theory. *Piercefield v. Remington Arms Co., Inc*., 375 Mich. 85, 96, 133 N.W.2d 129 (1965). Rather, at common law, a plaintiff need only show that a product was sold in a defective condition and the defect caused the plaintiff's injury. *Id.* at 96–97, 133 N.W.2d 129. However, tort reform legislation effective in 1996 displaced application of the common law in certain products liability actions. *Greene v. A.P. Products, Ltd*., 475 Mich. 502, 507–508, 717 N.W.2d 855 (2006). Thus, MCL 600.2947(6), contained within the Revised Judicature Act, now governs the liability of a nonmanufacturing seller in breach of implied warranty cases." *Curry*, 286 Mich App at 591.

7, and MCL 600.2947. *Id.* at 8. But the Court acknowledges that the issue the trier of fact would consider is whether Meijer altered the product and failed to exercise reasonable care *because it did not provide "the instructions and warnings as originally included." Id*. at 8 (emphasis added).

However clever the *Pedersen* analysis purports to be, its practical effect is unmistakable: it imposes on Meijer the very same duty that MCL 600.2948(3) keys to the knowledge of *the manufacturer* because only the manufacturer has the "scientific, technical, or medical information" necessary to determine whether, and if so which, warnings and instructions are necessary.[3] Taken to its logical conclusion, the duty recognized in *Pedersen* is nearly impossible for a retailer to satisfy.

Far from the narrow scope of liability the tort reform statute envisions, *Pedersen* imposes a duty nearly commensurate with that of the pre-tort reform era. When a product lacks intact packaging due to a customer return or use as a display model, or when a customer has opened a shelved item to more closely evaluate the product, the non-manufacturing seller must now somehow determine whether the product requires warnings and instructions, what the warnings and instructions must say, and whether the necessary warnings and instructions were originally included with the product. How would a retailer, lacking the expertise of a manufacturer, go about making these determinations?

In the usual course, there would be no way for a retailer to know what warnings or instructions the product originally contained. A retailer is not required to open the packaging of each of the many thousands of products it places on its shelves to evaluate and document the

[3] Because MCL 600.2947(6)(a) provides the sole source of liability against non-manufacturing sellers, and because MCL 600.2948(3) looks to what the manufacturer knew or should have known about the risk based on reasonably available scientific, technical or medical information, the term "seller" as used in the context of MCL 600.2948(3) should not be construed to include non-manufacturing sellers.

inclusion of warnings or instructions. See e.g., *Walker v Decora, Inc*, 225 Tenn 504; 471 SW2d 778, 783 (1971) (addressing "sealed container" defense under Ohio law and stating that the doctrine of strict liability has not been applied to a merchant who sells the product in a sealed container and who is afforded no reasonable opportunity to inspect). See also, *Konstantinov*, 619 F Supp 2d at 332-333 (stating that a seller "has no duty to inspect a product unless the seller has reason to know that it is defective or the defect is readily ascertainable").

Thus, the *Pedersen* rule casts the non-manufacturing seller in the role of the manufacturer, tasked with determining *whether the bare product* presents a risk of harm that must be addressed by warnings and instructions, despite the non-manufacturing seller's lack of scientific, medical or technical information necessary to make these determinations. This moves the law of products liability backwards, requiring a retailer to duplicate in the course of a sale the manufacturer's duty to warn and instruct.

While the first well-known component of the duty analysis is foreseeability of the risk, other important considerations are equally important including the "degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and, finally, the burdens and consequences of imposing a duty and the resulting liability for breach." *Buczkowski v McKay*, 441 Mich 96, 100 n 4; 490 NW2d 330 (1992), citing Prosser & Keeton, § 53, p. 359, n. 24. The *Pedersen* decision does not evaluate these factors.

In *Buczkowski*, this Court distinguished between "duty as the problem of the relational obligation between the plaintiff and the defendant, and the standard of care that in negligence cases is always reasonable conduct." *Id*. at 100-101 (footnotes omitted). But in *Antcliff v State Employees Credit Union*, 414 Mich 624, 631, n 5; 327 NW2d 814 (1982), this Court pointed to

Prosser's caution that the distinction between the two is for convenience only; they "are correlative, and one cannot exist without the other," and in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500-501; 418 NW2d 381 (1988), this Court said the court decides questions of duty and "the general standard of care," while the jury "determines what constitutes reasonable care," but "*in cases in which overriding public policy concerns arise, the court determines what constitutes reasonable care*." *Id.* (emphasis added). *Pedersen* does not engage in this analysis or address the attendant policy concerns.

In *Williams*, the issue was whether the defendant drugstore owner owed a duty to provide armed security guards to protect customers from armed robbers. This Court observed that the duty to provide police protection is vested in the government, neither the Legislature nor the constitution extends that duty to commercial businesses, and a defendant cannot control the degree of crime in the community. This Court also said that any duty it might impose "would be inevitably vague, given the nature of the harm involved," and "[f]airness requires that if a merchant could be held liable for the failure to provide security guards, he *should be able to ascertain in advance the extent of his duty and whether he has fulfilled it*." *Id*. at 502-503 (emphasis added).

These tenets apply equally to the *Pedersen* duty. It is not at all clear what the Court of Appeals would have had Meijer do. If the intent of the *Pedersen* decision is to warn retailers that, because of these obstacles, they cannot sell products with open or missing packaging, the burden on the retail industry will be immense. Customers frequently open packaging to look inside, leaving the product susceptible to being separated from the totality of its contents. Add to this the number of products the customers return in open packaging or without any packaging, the number of display models throughout the store that are separated from packaging, and the countless items that end the season as clearance merchandise. Is this all to be considered inappropriate for sale

and discarded or returned to the manufacturer? The economic and logistical costs would be enormous, not to mention the hardship on consumers who could no longer purchase these goods at clearance-favorable prices.

But how else might the non-manufacturing seller meet this duty? In the retail "super store" self-service environment, there is little contact between sales personnel and the customer. The customer might well go through the entire product selection and purchase process without interacting with a store employee. He or she might easily select an item off the shelf that became separated from its packaging or that has open packaging, place it in his or her cart with other items, and go through a self-serve checkout line, never giving the retailer the opportunity to determine whether the product contains the requisite instructions and warnings (whatever they might be). Even in an attended checkout, it is not reasonable to expect the cashier to become familiar with the contents of every product, let alone contemplate the need for warnings and instructions with respect to every item that goes through the line. Mr. Pedersen admitted that he did not have a conversation with anyone at Meijer about the tree stands. He simply picked them up, paid for them, and left the store. See Meijer's App. at 6.

This context is relevant to the duty question. See *Buczkowski*, 441 Mich at 100, where this Court, in holding that the retailer Kmart had no duty to protect a member of the general public from the unlawful use of ammunition by an intoxicated customer, considered the context of the "supermarket setting." See *id*. at 104 ("the issue here is not whether it is foreseeable that an intoxicated customer may injure another with a nondefective product, but whether a retailer ***in the supermarket setting*** presented should be liable for a clerk's failure to foresee a customer's criminal purpose.") (emphasis added).

Recognizing a duty under these circumstances would be akin to imposing a form of absolute liability in the products arena, a theory that has never been adopted in Michigan. See *Prentis v Yale Mfg Co*, 421 Mich 670, 683; 365 NW2d 176 (1984) (rejecting strict liability in design defect cases); *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 612 n 10; 719 NW2d 40 (2006) (recognizing that Michigan is one of six states that do not recognize strict liability as a theory of recovery in product liability actions, citing 1 CCH Prod. Liability Rep. § 4016 (1981)); *Johnson v Chrysler Corp*, 74 Mich App 532, 535; 254 NW2d 569 (1977) ("In Michigan, two theories of recovery are recognized in product liability cases: negligence and implied warranty. Strict liability has not been recognized as a third theory of recovery.").[4]

This judicial reversal of the intent and effect of Michigan's products liability statute does not come without business and societal cost. As Deborah La Fetra explains in *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind L Rev 645, 683-684 (2003):

> Tort reform measures are generally designed to make more uniform and predictable the way in which the legal system will work; to make it more just; to reduce the cost of litigation and the overall transaction costs; to restore the competitiveness of American industry; to provide additional incentives for research; and to develop and offer for sale in the market new and better medical devices, mechanical products and sporting goods that Americans have come to expect. [footnotes omitted].

Pedersen undermines these goals, creating a slippery, down-sliding slope in place of uniformity, predictability, and certainty. The spectre of liability is massive, but *Pedersen* provides no guidance as to how far the duty goes or how it can be avoided. Must retailers log the contents of every pre-

[4] Plaintiff argues that Meijer has a store policy prohibiting the sale of unboxed deer stands. A violation of store policy - in and of itself - cannot give rise to retailer liability. In *Buczkowski*, this Court said "Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to public policy. Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability." *Buczkowski*, 441 Mich at 99, n 1.

packaged good that comes into their stores so they can confirm the integrity of products in open or damaged packaging or create substitute instructions and warnings for products that have become separated from their packaging? Or must every open package be returned to the manufacturer or discarded at a loss because it might be missing part of its originally included contents?

Fashioning any such rule based on the *Pedersen* facts is particularly troublesome given that Mr. Pedersen purchased the product as a clearance item knowing that it lacked packaging, warnings, and instructions, which he admitted that, except for a warning plastered on the product, he likely would not have read. As Justice Blackburn explained in *Fletcher v Rylands*, 1 L R Exch 265 (1866), where "circumstances were such as to show that the plaintiff had taken the risk upon himself," liability should not be imposed upon another.[5] Similarly, in *Escola v Coca-Cola Bottling Co*, 24 Cal 2d 453, 462; 150 P2d 436 (Cal 1944) (Traynor J., concurring), Justice Traynor observed that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Sometimes, where the consumer is an experienced user of the product and frankly admits that he already knows

[5] This was the result in another case involving the "on clearance" purchase of a deer hunter's tree stand. In *Adams v Meijer, Inc*., unpublished opinion per curiam of the Court of Appeals dated December 18, 2001, Docket No. 224213, the plaintiff purchased the tree stand for her husband. The box had been opened and there were no instructions with the product. Mrs. Adams asked a store clerk if everything was in the box and the clerk responded that he did not know but if anything was missing, the product could be returned. In sustaining the grant of summary disposition for lack of proximate cause, the Court of Appeals explained:

> In the instant case, Mr. Adams *himself* testified that he used the tree stand approximately twenty-three times over a two year period without incident and without reading any of the allegedly missing instructions or warnings. Considering that plaintiff remained indifferent to the lack of instructions and proceeded to successfully use the tree stand over a two-year period, plaintiff failed, as a matter of law, to present "substantial evidence" that his injury flowed from defendant's failure to inspect the box and ensure that all instructions were included. [*Id*. at 5 (emphasis in original)].

enough about the product as to not need instructions, the most effective deterrent to injury is simply common sense. As Deborah La Fetra explains in *Freedom, Responsibility, and Risk*:

> If we are to treat adults as adults, they must be permitted to assess and accept risks dependent on their own level of risk-aversion. Courts should neither act as though adults have the cognitive capacity of children, nor should they try to impose a risk-free society. Risk moves hand-in-hand with both freedom and responsibility; our tort system must balance all three, while eradicating none. [36 Ind L Rev at 674].

RELIEF REQUESTED

Amicus Curiae Retail Litigation Center joins Defendant-Appellant Meijer Stores, Inc., in urging this Court to grant leave to appeal and peremptorily reverse, or reverse after hearing, the decision in *Pedersen*.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By:*/s/Joanne Geha Swanson*
Joanne Geha Swanson (P33594)
Attorneys for Amicus Curiae
Retail Litigation Center, Inc.
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

Dated: December 29, 2017

CERTIFICATE OF SERVICE

Jill M. Clinard says that on December 29, 2017 she filed the foregoing Motion for Leave to File Brief of Amici Curiae The Retail Litigation Center in Support of Defendant-Appellant Meijer Stores, Inc.'s Application for Leave to Appeal with the Clerk of the Court using the Court's electronic filing system, which will electronically serve all parties of record.

/s/ Jill M. Clinard