STATE OF MICHIGAN
IN THE SUPREME COURT

MAUREEN ST. CLAIR,

Plaintiff-Appellant,

v

XPO LOGISTICS, INC. d/b/a UX ASSEMBLY & INSTALLATION, ICON HEALTH & FITNESS, INC., and CMC LOGISTICS, LLC,

Defendants-Appellees.

Case No. 165210
(consolidated with 165211)

COA No. 356954
(consolidated with 356968)

Macomb Circuit Court
LC No. 2019-004971-NO
Hon. James M. Maceroni

DEFENDANT-APPELLEE ICON HEALTH & FITNESS INC.'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL IN DOCKET 165210

Submitted by:
Lincoln G. Herweyer (P55742)
Attorney for Defendant-Appellee ICON
35054 Twenty-Three Mile Rd., Suite 115
New Baltimore, Michigan 48047
(586) 716-1562
Lgherweyer@aim.com

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I. DID THE TRIAL COURT AND COURT OF APPEALS CORRECTLY RECOGNIZE THAT ICON WAS ENTITLED TO SUMMARY DISPOSITION ON THE BASIS OF THE STATUTORY MISUSE DEFENSE, AND IS ICON OTHERWISE ENTITLED TO SUMMARY DISPOSITION?

A. Did The Lower Courts Correctly Rule for Icon on the Basis of MCL 600.2947(2)?

B. Would ICON Otherwise Be Entitled to Summary Disposition on Plaintiff's Failure-to-Warn Theory?

To each of the above questions:

Defendant-Appellee ICON answers: "Yes."

Plaintiff-Appellant answers: "No."

INDEX OF APPENDICES

Contemporaneously with the filing of this Supplemental Brief, Defendant-Appellee ICON is submitting a Supplemental Appendix, the contents of which are as follows:

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COUNTER-STATEMENT OF FACTS

Introduction.[1] Plaintiff-Appellant Maureen St. Clair ("Plaintiff") has applied to this Court for Leave to Appeal from the December 1, 2022 Judgment of the Court of Appeals majority (SAWYER, PJ., and REDFORD, J.) (Apx A), which affirmed the December 18, 2020 opinion and order of Macomb Circuit Court Judge James MACERONI (Apx C), which granted summary disposition to Defendant-Appellee ICON Heath and Fitness, Inc. ("ICON") in the products liability prong of this personal injury action.

Plaintiff's leg suffered a serious abrasion when it became pinned within the moving belt of a treadmill and a wall. Plaintiff then brought this hybrid personal injury action, asserting negligence claims against those Defendants that she believes were to blame for the installation and placement of the treadmill in her home, and a product liability claim against ICON, as the maker of the subject treadmill. With regard to ICON, Plaintiff challenges on appeal the trial court's granting of ICON's Motion for Summary Disposition on the basis that, pursuant to MCL 600.2947(2), Plaintiff's injury was the result of her misuse of the product, and the particular misuse in this case (being a confluence of factors) was not reasonably foreseeable to ICON.

The confluence of factors relating to Plaintiff's injury can be summarized succinctly. Plaintiff was unfamiliar with how to operate the treadmill, having only used it two other times. Plaintiff had not read the user's manual and the precautions set forth therein (despite warnings on the treadmill to do so), relying instead on her husband to do so for her. Plaintiff's husband had not explained to her the precautions and warnings set forth in the manual. Despite relying on her husband for knowledge of the treadmill's operation, Plaintiff chose to use the treadmill while her

[1] This introductory subsection, which is intended to orient the reader in preparation for the details that follow, is provided pursuant to MCR 7.212(C)(6)(g) ("any other matters necessary to the understanding of a controversy . . ."), as incorporated by MCR 7.305. Record citations are provided for the detailed facts that are provided in the subsequent subsections.

husband was absent from the house on a brief errand. Plaintiff did not attach the safety lanyard (a clip and cord attached to the safety key) to her clothing, which otherwise would have activated the emergency stop feature when she fell. Contrary to the warnings in the user's manual, Plaintiff used the treadmill while its rear was positioned within inches of a wall. And Plaintiff was using the treadmill while on prescribed medication that included Morphine, Percocet, and Robaxin.

Plaintiff believes that she fell because the treadmill unexpectedly sped up. However, the evidence established that if the treadmill's walking belt did accelerate, it did so as a programmed response (i.e., Plaintiff initiated one of the treadmill's pre-programmed workouts), and not as a result of a performance failure by the treadmill.

On appeal to the Court of Appeals, Plaintiff argued that there was a material question of fact as to whether her misuse of the product was reasonably foreseeable to ICON, and that Plaintiff had adequately set forth a products liability claim based on a failure-to-warn theory. As mentioned, the Court of Appeals majority affirmed the trial court's judgment (Apx A and C). However, the dissenting judge of the Court of Appeals, in a strained exercise of result-oriented reasoning, agreed with Plaintiff's position (Apx B, SHAPIRO, J., dissenting).

On January 11, 2023, Plaintiff applied to this Court for Leave to Appeal. On May 24, 2023, this Court issued an order directing the Clerk to schedule this case for oral arguments, and directing the parties to submit supplemental briefs. Plaintiff submitted her supplemental brief on August 7, 2023.

ICON now submits this supplemental brief asking this Court to either Deny Leave to Appeal or, alternatively, to affirm the Judgment of the Court of Appeals.

Fact Witnesses. Plaintiff (57 years old at her deposition) lives in Sterling Heights, Michigan with her husband, Roy St. Clair (Apx E, pp 6-10). She is retired from the Detroit Police Department (Apx E, pp 11-12). Following a 2015 back surgery, she went through physical therapy

at a place called Team Rehab, where she used a variety of exercise equipment, like a recumbent bike and "everything you can imagine." However, she denies using a treadmill at Team Rehab. (Apx E, pp 19-24.) Previously, she was a member at a gym, where she rode the bike and lifted weights, but denies knowing whether they had treadmills there (Apx E, p 28).

According to Plaintiff, some people at Team Rehab suggested that Plaintiff get a treadmill to get exercise while the weather was bad, so she and her husband went shopping for one at "some sports place." Plaintiff indicated which model she liked, but her husband otherwise handled the transaction. (Apx E, pp 30-33.)

According to Plaintiff's husband, Roy (also a retired Detroit Police officer), he went to Sports Authority alone to purchase the treadmill, and he selected it, purchased it, and arranged the delivery on his own (Apx F, pp 6-9, 17-18).

A treadmill was originally delivered to Plaintiff's home on March 2, 2015, but the incline for the walking deck did not function properly, so Roy had to call the store to say it was not working. The installers came back with a replacement on March 13, 2015. (Apx F, pp 24-25.) Between then and the accident, Roy used the treadmill maybe three times (Apx F, p 50). Roy testified that when he used the treadmill he never used the safety clip because he saw no reason for him to do so (Apx F, pp 28-29), even though he knew the purpose of it. (Apx F, p 50.)

Plaintiff did not read the manual, she left that up to Roy. (Apx F, pp 29-30.) Roy did not tell Plaintiff about any safety key and Plaintiff claims to not remember if the treadmill even had such a feature (Apx F, pp 41-42). Roy conceded that he reviewed the user's manual after the installers left, but he saw no reason for Plaintiff to use the safety clip because she would be using the treadmill at a walking pace. Roy does not recall seeing anything in the manual about leaving clearance at the rear of the treadmill. (Apx F, pp 28-30.)

The placement of the treadmill was selected by the installers. Roy told them that his wife wanted to watch TV while using it. (Apx F, pp 30-31.) The great room is roughly 30' by 30' (Apx F, p 32). There was room to put the treadmill at other locations in the room, but Roy never suggested that to them because he thought they knew what they were doing (Apx F, p 33). There were only inches of clearance behind the treadmill and the wall (Apx E, p 62).

The actual incident occurred on March 16, 2015 (Apx E, pp 50-51). It was in the afternoon and Roy had gone out to pick up the dog from the groomer. As before, Plaintiff did not use the safety clip (Apx E, pp 51-52). She intended to go slow and she assumed that the safety clip was just for when you are going fast (Apx E, p 53). Plaintiff does not recall setting the treadmill at any particular speed, but recalls that it was going very slow when it started and she stepped onto it. She testified to the belief that the treadmill would respond to the speed of the user, and go faster if the user started to go faster "because it had all that stuff."[2] (Apx E, pp 53-54.) Plaintiff estimates that she was walking for 5 minutes when the treadmill jerked and sped up. She tried to hold on, but she fell. She had long, thick pajamas on and her leg became stuck between the wall and the treadmill. Plaintiff screamed and could see blood and tissue and skin. She reached the power cord and yanked the plug from the wall. The treadmill stopped. (Apx E, pp 54-56.)

Roy came back from the dog groomer's shortly after the accident, and found his wife with her leg twisted, and skin and blood everywhere. He called 911 and they took her to the hospital. (Apx F, pp 65-67.) On the day of the incident, Plaintiff was on medication (Prednisone, Crestor, Morphine, Percocet, Robaxin, Synthroid) (Apx E, pp 64-67). Plaintiff and Roy still own the treadmill. It is now in their garage. (Apx E, p 112.)

[2] The subject treadmill had no such artificial intelligence or interactive technology.

Plaintiff's Expert. Gary M. Hutter obtained a mechanical engineering degree in 1970, an environmental engineering degree in 1977, a Ph.D. in environmental and occupational health studies in 1991, and completed program in human factors. (Apx H, pp 92-93.) Hutter testified that there is a warning on the console of the treadmill instructing a user to stand on the foot rails before starting the treadmill and to read and understand the user's manual before use. However, it does not say anything about using the lanyard, and there is no feature on the treadmill for housing the user's manual. (Apx H, pp 13-15.)

Hutter blames the installers of the treadmill for placing it contrary to codes and standards and the instructions of ICON. It was too close to the wall. It could have been placed at several other locations in the room that would not have had those problems. (Apx H, pp 20-21.) The installers should have been trained in treadmill safety and should have read the whole manual and understood the precautions (Apx H, pp 22-24, 32).

Hutter thinks ICON should have had a removable tape on the back of the treadmill reminding installers that it should be installed 8 feet away from a wall (Apx H, p 36). The manual's caution No. 6 advises on the proper clearances for placement of the treadmill, but does not explain to a reader why such clearance is needed (Apx H, pp 37-38). A treadmill like this could have been designed with guarding over the back that would have prevented or mitigated this kind of event (Apx H, p 38).

Hutter had not identified a manufacturing defect or glitch in the treadmill's electrical components. He is aware of some product recalls for treadmills of an earlier time period regarding sudden changes in speed, but has no evidence that this treadmill had a defect. (Apx H, pp 42-43.) Huutter conceded that that Plaintiff may have had the treadmill on a setting that would have the treadmill increase in speed over time. (Apx H, pp 50-51.)

The function of the lanyard is to cause the power to be taken away from the drive motor so that the treadmill will coast to a stop. The lanyard concept is very popular with treadmill manufacturers. (Apx H, p 47.) He also agrees that wearing the lanyard could have mitigated or eliminated Plaintiff's injury. (Apx H, p 79.) Hutter agrees that providing 8 feet of clearance would also have mitigated the injury in this case (Apx H, p 82).

ICON's Expert. Laurel Hodges Jensen has an engineering degree in Industrial Technology and has spent his career working in that field. Presently, he is the Director of Product Safety for ICON. (Apx G, pp 5-6.) He is an expert in fitness equipment, has testified at trials on more than 12 occasions, and has been deposed more than 100 times. (Apx G, pp 7-8.)

The subject treadmill, the Pro-Form Performance 300, was designed by ICON's research and development department in Logan, Utah, but it was manufactured in China by a company called Ever Sport that ICON built but no longer owns (Apx G, pp 14-16). On page 3 of the manual for that model, there is a warning regarding minimum clearances for the placement of the treadmill. The reason for that warning is to ensure that sufficient clearance is provided in case a person was to fall or dismount from the treadmill, i.e., so that they do not impact something or get held against the belt. (Apx G, pp 19-21.)

There have never been any reported electrical issues with this model treadmill, nor any issues with this treadmill experiencing sudden acceleration or sudden deceleration (Apx G, p 24). There have been no recalls of this model treadmill or of any prior substantially similar treadmills (Apx G, p 40). Jensen understands that Plaintiff is claiming that the belt on her treadmill suddenly accelerated causing her to fall. However, from his perspective that is not something that could have happened with this particular treadmill. The control system on that model has components to control the speed, and there are back-up components to those. In order for a sudden acceleration to occur, those components would have to have been destroyed. Jensen inspected the subject

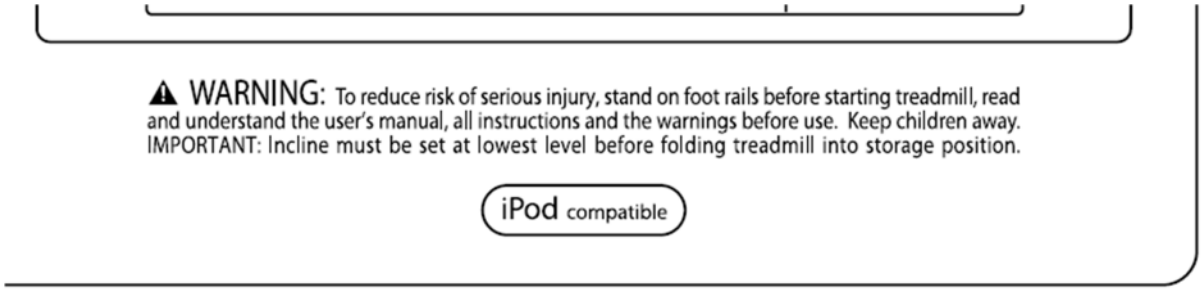
treadmill in Plaintiff's home, and those components were functioning. (Apx G, pp 30, 41-42.) Assuming that Plaintiff was trying to tell the truth, what she perceived was mostly likely a programmed response by the treadmill (Apx G, p 42).

Not using the lanyard is misuse, but not necessarily foreseeable misuse. ICON wants users of the treadmill to use the lanyard. A person who falls while on the treadmill might not be able to manually shut off the treadmill, so that is what the lanyard is for. (Apx G, pp 46-47.)

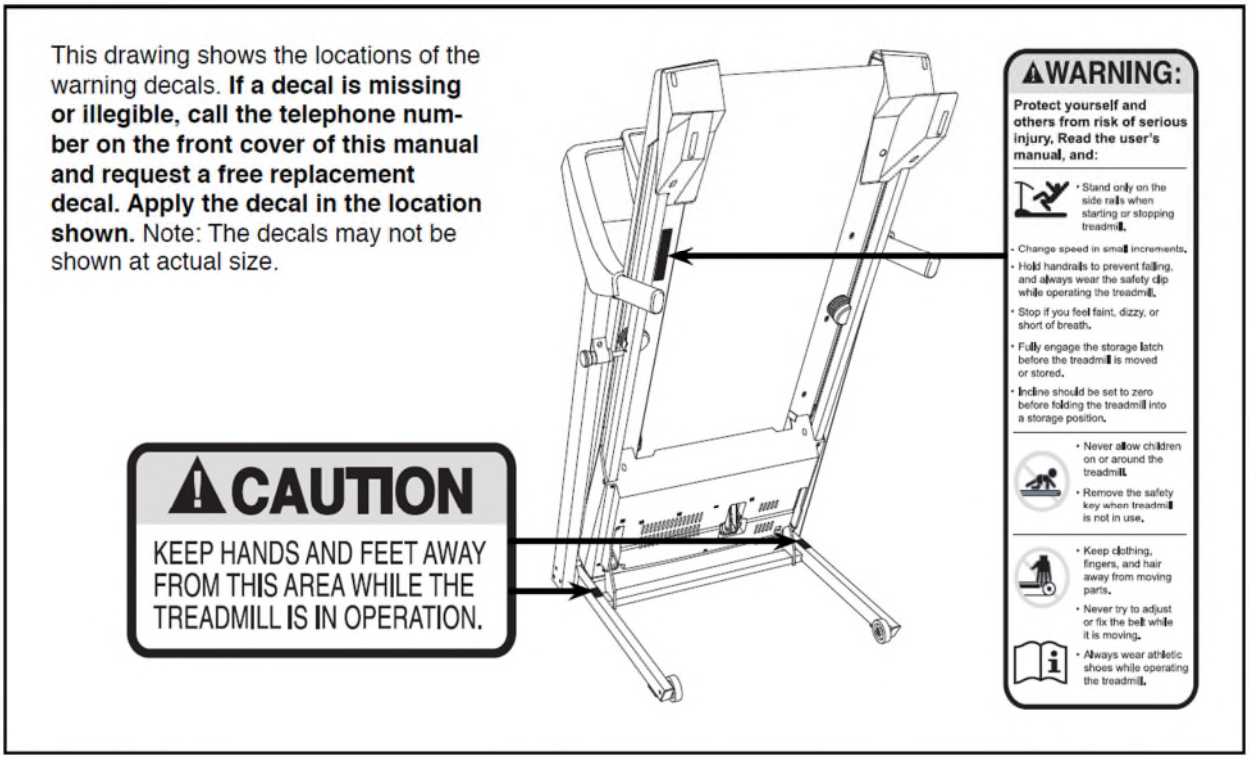
The user manual has a number specific warnings, including No. 6, which mandates two feet of clearance on each side and 8 feet of clearance behind. ICON also has a warning right on the console of the treadmill directing users to consult the user manual for specific information and warnings it contains. (Apx G, pp 80-82.)

Jensen is not aware of any other cases involving this model of treadmill, or involving any substantially similar model, of a person being pinned at the back of a treadmill (Apx G, p 88). The factors here were that Plaintiff was on medication, inexperienced with use of the treadmill, and was using it without the lanyard and with insufficient rear clearance (Apx G, pp 88-89).

The Treadmill and Manual. Appendix D to this Answer is the user's manual associated with the subject treadmill. The treadmill has three warning decals on it. First, on the console: of the treadmill (see Apx D, p 15):



In addition, this particular treadmill is designed so that it can be folded up by its user in order to save space while not in use. There are two more warning decals on the treadmill that are designed to be seen each time the user unfolds the treadmill for use (see Apx D, p 2):



Note that the warnings to "read the user's manual" and to "always wear safety clip while operating the treadmill" appear prominently both on the onboard decal and also on the second page of the manual. On pages three and four of the manual are 30 important warnings (see Apx D, pp 3-4), that are preceded by the following:

WARNING: To reduce the risk of burns, fire, electric shock, or injury to persons, read all important precautions and instructions in this manual and all warnings on your treadmill before using your treadmill. ICON assumes no responsibility for personal injury or property damage sustained by or through the use of this product.

Each of the 30 warnings and precautions is important, but those that are particularly pertinent to the instant case are Nos. 1, 3, 6, and 17. Warning No. 1 says that it is the responsibility of the owner to make sure all users are adequately informed of all the warnings and precautions;

Warning No. 3 says to use the treadmill only as described in the manual; Warning No. 6 instructs that there must be 8 feet of clearance behind the treadmill and 2 feet of clearance on each side; and Warning No. 17 directs the user to learn and understand the emergency stop procedure, and to "Always wear the clip while using the treadmill." (Apx D, p 3.)

IMPORTANT PRECAUTIONS

⚠WARNING: To reduce the risk of burns, fire, electric shock, or injury to persons, read all important precautions and instructions in this manual and all warnings on your treadmill before using your treadmill. ICON assumes no responsibility for personal injury or property damage sustained by or through the use of this product.

1. It is the responsibility of the owner to ensure that all users of this treadmill are adequately informed of all warnings and precautions.
2. Before beginning any exercise program, consult your physician. This is especially important for persons over age 35 or persons with pre-existing health problems.
3. Use the treadmill only as described in this manual.
4. The treadmill is intended for home use only. Do not use the treadmill in any commercial, rental, or institutional setting.
5. Keep the treadmill indoors, away from moisture and dust. Do not put the treadmill in a garage or covered patio, or near water.
6. Place the treadmill on a level surface, with at least 8 ft. (2.4 m) of clearance behind it and 2 ft. (0.6 m) on each side. Do not place the treadmill on any surface that blocks air openings. To protect the floor or carpet from damage, place a mat under the treadmill.
7. Do not operate the treadmill where aerosol products are used or where oxygen is being administered.
8. Keep children under age 12 and pets away from the treadmill at all times.
9. The treadmill should be used only by persons weighing 300 lbs. (136 kg) or less.
10. Never allow more than one person on the treadmill at a time.
11. Wear appropriate exercise clothes while using the treadmill. Do not wear loose clothes that could become caught in the treadmill. Athletic support clothes are recommended for both men and women. *Always wear athletic shoes. Never use the treadmill with bare feet, wearing only stockings, or in sandals.*
12. Plug the power cord into a surge suppressor (not included), and plug the surge suppressor into an appropriate outlet (see page 14). To avoid overloading the circuit, do not plug other electrical devices, except for low-power devices such as cell phone chargers, into the surge suppressor or into an outlet on the same circuit.
13. Use only a surge suppressor that meets all of the specifications described on page 14. To purchase a surge suppressor, see your local PROFORM dealer, call the telephone number on the front cover of this manual, or see your local electronics store.
14. Failure to use a properly functioning surge suppressor could result in damage to the control system of the treadmill. If the control system is damaged, the walking belt may slow, accelerate, or stop unexpectedly, which may result in a fall and serious injury.
15. Keep the power cord and the surge suppressor away from heated surfaces.
16. Never move the walking belt while the power is turned off. Do not operate the treadmill if the power cord or plug is damaged, or if the treadmill is not working properly. (See MAINTENANCE AND TROUBLESHOOTING on page 21 if the treadmill is not working properly.)
17. Read, understand, and test the emergency stop procedure before using the treadmill (see HOW TO TURN ON THE POWER on page 16). Always wear the clip while using the treadmill.
18. Always stand on the foot rails when starting or stopping the walking belt. Always hold the handrails while using the treadmill.
19. When a person is walking on the treadmill, the noise level of the treadmill will increase.

20. Keep fingers, hair, and clothing away from the moving walking belt.

21. The treadmill is capable of high speeds. Adjust the speed in small increments to avoid sudden jumps in speed.

22. The heart rate monitor is not a medical device. Various factors, including the user's movement, may affect the accuracy of heart rate readings. The heart rate monitor is intended only as an exercise aid in determining heart rate trends in general.

23. Never leave the treadmill unattended while it is running. Always remove the key, press the power switch into the off position (see the drawing on page 6 for the location of the power switch), and unplug the power cord when the treadmill is not in use.

24. Do not attempt to move the treadmill until it is properly assembled. (See ASSEMBLY on page 8 and HOW TO FOLD AND MOVE THE TREADMILL on page 20.) You must be able to safely lift 45 lbs. (20 kg) to move the treadmill.

25. When folding or moving the treadmill, make sure that the storage latch is holding the frame securely in the storage position.

26. Do not change the incline of the treadmill by placing objects under the treadmill.

27. Never insert any object into any opening on the treadmill.

28. Inspect and properly tighten all parts of the treadmill regularly.

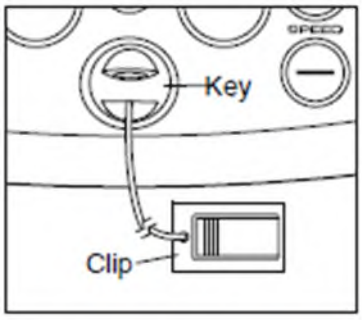
29. **DANGER:** Always unplug the power cord immediately after use, before cleaning the treadmill, and before performing the maintenance and adjustment procedures described in this manual. Never remove the motor hood unless instructed to do so by an authorized service representative. Servicing other than the procedures in this manual should be performed by an authorized service representative only.

30. Over exercising may result in serious injury or death. If you feel faint, if you become short of breath, or if you experience pain while exercising, stop immediately and cool down.

SAVE THESE INSTRUCTIONS

Warning No. 17 directs the reader to page 16 of the manual, where it states:

Next, stand on the foot rails of the treadmill. Find the clip attached to the key (see the drawing to the right) and slide the clip onto the waistband of your clothes. Then, insert the key into the console. After a moment, the displays will light. **IMPORTANT: In an emergency, the key can be pulled from the console, causing the walking belt to slow to a stop. Test the clip by carefully taking a few steps backward; if the key is not pulled from the console, adjust the position of the clip.**



Procedural History. The present iteration of this action was commenced in Macomb Circuit Court on December 6, 2019 (Complaint, Lower Court File). Count II of the Complaint set forth Plaintiff's Product Liability claims against ICON, and asserted what can reasonably be categorized as alternate theories of liability based on: (a) design defect; (b) manufacturing defect;

(c) breach of express or implied warranty; and (d) a failure to warn. Count II also alleged that said product liability defects were the result of both negligence and gross negligence.[3] (Complaint, ¶¶ 18-31.)

Following discovery, on October 13, 2020 ICON moved for summary disposition, on the following bases:

A. Plaintiff cannot meet her burden of proof to establish that the subject treadmill had a design defect;

B. Plaintiff cannot meet her burden of proof to establish the subject treadmill had a manufacturing defect;

C. Plaintiff cannot meet her burden of proof to establish ICON's liability under a failure to warn theory;

D. Plaintiff cannot demonstrate liability for breach of an implied warranty;

E. ICON was not grossly negligent as defined by MCL 600.2945(d), and the circumstances described by MCL 600.2949a are not true; and

F. ICON is either shielded from liability, or its liability is limited, pursuant to MCL 600.2946a, MCL 600.2947(2) and (4), and MCL 600.2948(2).

(ICON's 10-13-21 Motion, pp 1-2, ¶ 5, Lower Court File.) The statutory "misuse" defense is codified at MCL 600.2947(2), and it was presented as part of sub-argument F, above.

On November 9, 2020, Plaintiff filed a Response in opposition to ICON's Motion for Summary Disposition, along with an incorporated Brief in support (11-9-20 Response, Lower Court File). The Response was significant in a number of ways. First, the Response expressly disavowed that Plaintiff was alleging (or continuing to allege) any gross negligence on the part of

[3] Normally, a claim for "gross negligence" adds nothing to a negligence claim, absent a statutory basis for making the concept relevant. In a product liability case, certain statutory protections (e.g., the misuse defense, the sophisticated user defense, and the cap on non-economic damages) are not available to a product manufacturer/designer defendant who has wilfully disregarded actual knowledge of a dangerous defect that is substantially likely to cause the particular injury experienced. See MCL 600.2949a. See also MCL 600.2945(d) (defining the relevant concept of "gross negligence").

ICON. Second, the Response made no attempt to support Plaintiff's claims based on design defect, manufacturing defect, or breach of warranty. And third, (except for a mention of the Summary Disposition standard) the Response did not include a single reference to legal authority—not one citation to a case or a statute. (*Id.*)

What the Response did include was two factual arguments. First, the Response treated Plaintiff's "misuse" of the product as if it was only significant to a comparative negligence defense, and failed to acknowledge that its actual significance was a complete shield from liability (for ICON) under MCL 600.2947(2). Second, the Response argued that Plaintiff's case should go forward on a failure-to-warn theory because, allegedly, ICON should have included warnings designed to be noticed and appreciated by professional installers, and because the onboard and user manual warnings did not specify the various consequences that could occur as a result of not heeding the given warnings.

On November 12, 2020, ICON filed a Reply Brief in support of its Motion for Summary Disposition (ICON's 11-12-20 Reply, Lower Court File). First, ICON explained that Plaintiff was confusing the statutory "misuse" defense (a complete defense to liability) with the related, but distinct, concept of comparative negligence. Second, ICON's Reply noted how the statutory "sophisticated user" defense precluded liability for alleged inadequate warnings to the installers and that Michigan Supreme Court precedent rejects the concept that a designer/manufacturer must warn of specific ramifications of not heeding a warning. Third, the Reply noted how Plaintiff had abandoned any and all theories of liability against ICON except for the failure-to-warn theory. (ICON's 11-12-20 Reply, Lower Court File.)

On November 16, 2020, the trial court heard oral arguments from the parties, indicating from the outset that it intended to take the matter under advisement (Tr 11-16-20, p 5). ICON briefly noted that Plaintiff was confusing the concept of her misuse of the product with the separate

concept of her contributory negligence ("Misuse is something that the Court decides pursuant to MCL 600.2947[2]" [Tr 11-16-20, pp 5-6]). Plaintiff noted that a "manufacturer may be relieved of liability for misuse of the product unless, and it is a big unless, the misuse is reasonably foreseeable." (*Id.*, p 8.)

On December 18, 2020, the trial court entered an Opinion and Order granting ICON's Motion for Summary Disposition on the basis of the statutory "misuse" defense. The trial court noted that Plaintiff's misuse was comprised of a number of factors, and also ruled that the particular misuse by Plaintiff (i.e., not reading the instructions, not wearing the safety lanyard, while using the treadmill in a position of inadequate rear clearance) was not reasonably foreseeable to ICON. (Apx C.) The trial court also correctly recognized that "misuse" (when it applies) is a complete defense, stating: "Because ICON is entitled to Summary Disposition based on [Plaintiff's] misuse, it is unnecessary to address [ICON's] arguments regarding [Plaintiff's] inability to meet her burden of proof and ICON's other statutory liability protections." (Apx C, pp 6-7.)

Plaintiff appealed by right to the Court of Appeals (COA docket 356954) from the resolution of her product liability claim, together with the trial court's determination of her negligence claims agains the other defendants (see also COA docket 356968). On December 1, 2022, the majority opinion of the Court of Appeals (SAWYER, PJ., and REDFORD, J.) affirmed the judgment of the trial court (Apx A). However, a dissenting judge on that panel (SHAPIRO, J.) agreed with Plaintiff (Apx B).

Additional facts are provided as necessary in the Argument section.

ARGUMENT

I. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY RECOGNIZED THAT ICON WAS ENTITLED TO SUMMARY DISPOSITION ON THE BASIS OF THE STATUTORY MISUSE DEFENSE. MOREOVER, ICON IS OTHERWISE ENTITLED TO SUMMARY DISPOSITION.

Issue Preservation. On October 13, 2020, ICON moved for summary disposition and challenged every theory of liability that Plaintiff had against ICON, and did so both with and without the statutory protections implemented by the Legislature through 1995 PA 249 and found at MCL 600.2945 *et seq*. In a Response filed on Novembr 9, 2020, Plaintiff denied she was advancing a claim that would obviate any of the statutory protections bestowed on ICON by MCL 600.2945 *et seq.*, and limited her theory of the case to only two positions: (1) that the misuse defense was not applicable; and (2) that ICON should be liable to Plaintiff on a failure-to-warn theory. (Lower Court File.) The motion was argued before the trial court on November 16, 2020, and resolved adversely to Plaintiff's position in a written Opinion and Order issued on December 18, 2020. The same issues were addressed by the Court of Appeals, where they were again resolved adversely to Plaintiff's positions (Apx A).

Because Plaintiff's present bases for why this Court should grant leave with respect to the products liability component of her action are limited to the same two issues she adhered to below (i.e. the appliciability of the misuse defense and, absent that, the viability of a failure-to-warn claim), her issues (with respect to ICON) are fully preserved for appellate review. See *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 554 (2003). This Court should bear in mind, however, that Plaintiff has waived and/or forfeited all other theories of liability (e.g., design defect, manufacturing defect, warranty) against ICON.

Standard of Review. A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter

of law. *Maiden v Rozwood*, 461 Mich 109, 118 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra*, 461 Mich at 120.

"Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court." MCL 600.2947(2). "[F]indings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C). Clear error exists when "a review of the entire record leaves this Court with the definite and firm conviction that the circuit court made a mistake." *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 19 (2011).

Discussion. The trial court properly determined that Plaintiff misused the treadmill and that her particular misuse was not reasonably foreseeable to ICON (i.e., it was not a common practice by users of the treadmill and one of which ICON was, or should have been, aware). Therefore, the Court of Appeals correctly affirmed the trial court's grant of Summary Disposition to ICON on the trial court's reasoning. Alternatively, Plaintiff's failure-to-warn claim fails of its own accord because the evidence clearly establishes that ICON used reasonable efforts to inform users of the material risks associated with use of the subject treadmill. Consequently, this Court should DENY leave to appeal with respect to the product liability aspect of Plaintiff's action because the judgment of the Court of Appeals was not clearly erroneous and imposes no material injustice.

As an outline for the reader, this Argument is subdivided into three sub-parts, A to C. Sub-part A will demonstrate that the lower courts' resolution of the issues under MCL 600.2947(2) (that Plaintiff's injury was a result of misuse not reasonably foreseeable to ICON) was not clearly erroneous. Sub-part B will demonstrate that ICON was entitled to Summary Disposition on

Plaintiff's failure-to-warn theory. Finally, sub-part C will critically analyze the flaws of reasoning set forth in the dissenting opinion from the Court of Appeals panel.

Importantly, this Court should bear in mind that each of the first two sub-parts (A and B) represents an independent and sufficient basis for why judgment in favor of ICON was proper. That is to say, the "misuse" defense (if it applies) is a complete defense to liability in a products liability action. Moreover, since a failure-to-warn theory is the only basis for liability against ICON that Plaintiff did not abandon,[4] where ICON was otherwise entitled to Summary Disposition on that theory, then Summary Disposition for ICON should stand even absent application of the "misuse" defense.

A. The Lower Courts Did Not Err in Ruling for ICON on the Basis of MCL 600.2947(2).

As an intitial matter, Plaintiff argues that there is *a question of fact* as to whether ICON can avail itself of the "misuse" defense set forth in MCL 600.2947(2). That provisions states:

> A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable <u>are legal issues to be resolved by the court</u>.

The obvious implication of Plaintiff's "there is a question of fact" argument is the erroneous notion that there is some function to be performed by a Jury with regard to the applicability (or not) of the "misuse" defense. But clearly, that is not the case. By legislative fiat, misuse is to be decided by the court. Indeed, there is not even a serious question about what Plaintiff did or did not do, the only questions are whether what Plaintiff did was misuse, and if it was, whether what Plaintiff did was reasonably foreseeable to ICON such that ICON should have

[4] A party may not leave it to the Court to search for authority to sustain or reject its positions. See e.g., *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14 (2003); *Magee v Magee*, 218 Mich App 158, 161 (1996); *Hover v Chrysler Corp*, 209 Mich App 314, 319 (1995); *In re Powers*, 208 Mich App 582, 588 (1995).

expected it. To the extent that there were factual components to resolving those questions, the Legislature assigned the task of resolving those questions to the trial court—not a jury.

Hence, if this Court were to now determine that this claim of error turns on the trial court's resolution of a factual component to the overall question (rather than on the court's interpretation and application of the law), this Court would have to affirm unless this Court was left "with the definite and firm conviction that the circuit court made a mistake." *Hills & Dales, supra*, 295 Mich App at 19. See also MCR 2.613(C).

The determinations to be made under MCL 600.2947(2) require the application of a two-step inquiry established in *Iliades v Dieffenbacher N Am Inc*, 501 Mich 326 (2018). "First, a court must decide whether there was misuse of the product. Second, if there was misuse, a court must decide whether that particular misuse was reasonably foreseeable by the manufacturer." *Id*. at 331.

Plaintiff Misused the Treadmill. MCL 600.2945(e) expressly defines "misuse" as follows:

> "Misuse" means use of a product in a materially different manner than the product's intended use. **Misuse includes** uses inconsistent with the specifications and standards applicable to the product, **uses contrary to a warning or instruction provided by the manufacturer, seller**, or another person possessing knowledge or training regarding the use or maintenance of the product, and **uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances**. [Emphasis supplied.]

Plaintiff failed to read the owner's manual or otherwise become knowledgeable about the precautions set forth therein, despite the warning right on the treadmill's console to do so. Being so unaware, she mistakenly set the treadmill on a programmed workout rather than a low speed-setting. Had she not tried to use the treadmill while not understanding how to work it, the accident would not have occurred. This was contrary to the warning on the console and contrary to 1, 3, 17, and 21 of the Important Precautions in the owner's manual.

Plaintiff failed to attach the safety lanyard to her clothing when using the treadmill. Had she not failed to use the lanyard, her abradement injury would not have occurred and it is likely that she may not even have fallen. Her failure to use the safety lanyard was contrary to Important Precaution no. 17, and contrary to the onboard warning decal that is reprinted on page 2 of the owner's manual.

Plaintiff used the treadmill while it was located in a position that did not provide the necessary rear clearance. Had she provided such clearance, her injury would either have been prevented or substantially moderated. Her failure in this regard was contrary to Important Precaution no. 6. Moreover, this specific misuse was particularly unjustified inasmuch as the subject model of treadmill was designed for users with space-saving concerns. That is to say, the treadmill was designed to be folded up and rolled to an out-of-the-way location when not in use. Each time it was to be used, it could be rolled out to a location of sufficient clearance, used, and then afterward returned in a folded up state to its storage place.

Even though Plaintiff had admittedly relied on her husband for his knowledge of how the treadmill worked, and she was aware that she had not read the user's manual and was unfamiliar with its operation, she nonetheless knowingly elected to use it while her husband was absent on a brief errand. This would be analogous to a student pilot taking a plane up without the instructor onboard while being fully aware that he or she (the student) does not know everything necessary to safely fly the aircraft. She was aware of her own lack of knowledge. Clearly, that would be a use "other than [one] for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances." MCL 600.2945(e).

Even though Plaintiff elected to not heed the safety warnings or even determine what they were, and knew she was unfamiliar with the operation of the treadmill, and knew that her husband would not be home, Plaintiff elected to use the treadmill while being on prescribed Morphine,

Percocet, and Robaxin (Apx E, pp 64-67). Each of those drugs can cause, *inter alia*, dizziness and lightheadedness. Clearly, using the treadmill unsupervised while on those drugs would also be a use "other than [one] for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances." MCL 600.2945(e).

Consequently, Plaintiff's use of the subject treadmill was indisputably "misuse" under MCL 600.2945(e) because that statutory provision expressly defined what she did to be "misuse."

Plaintiff's Particular Misuse Was Not Reasonably Foreseeable to ICON. As for whether that misuse was reasonably foreseeable, a reviewing court would not look at the components of that misuse in isolation (i.e., whether people in general might foreseeably engage in one of the several aspects of Plaintiff's misuse). Rather, the Michigan Supreme Court has said that: "To answer this question, a court would look to the record evidence to decide whether [the defendant] knew or should have known of [the plaintiff's] conduct." *Iliades, supra,* 501 Mich at 340. "**In other words, the question for purposes of foreseeability is whether [the defendant] knew or should have known of [the] <u>particular</u> misuse.**" *Id.* (Bolding and underlining supplied.)

In this case, the particular misuse by Plaintiff is comprised of a number of factors that had to all come together in order to cause Plaintiff's injury. And to determine whether Plaintiff's particular misuse was reasonably foreseeable this Court would look at whether Plaintiff's particular misuse was a common practice by users, and one of which ICON was aware or should have been aware. See *Iliades, supra* at 339. See also *Mach v Gen Motors Corp*, 112 Mich App 158, 163 (1982) ("The crucial inquiries under this test [of foreseeability by the manufacturer] are **whether the use made of the product was a common practice and whether the manufacturer was aware of that use**" [emphasis supplied]); accord *Gootee v Colt Indus, Inc*, 712 F2d 1057, 1064 (CA 6, 1983) ("Crucial inquiries in determining whether a use is foreseeable include whether

the use made of the product was a common practice and whether the manufacturer was, or should have been aware, of that use").

Plaintiff offered no evidence to support the notion that using this particular treadmill model without the safety lanyard, and without adequate rear clearance, and while on Morphine, Percocet, and Robaxin, without adequate knowledge of how to control the treadmill's speed, and without presence of the person whom the user relies on for instruction, is a common practice among users of said treadmill model. Likewise, Plaintiff offered no evidence that ICON was, or should have been, aware that such was a common practice among users of this treadmill.

By contrast, ICON offered direct evidence to support both the proposition that Plaintiff's particular misuse was not a common practice, and that ICON had no reason to know that the same was a common practice. As noted by the trial court:

> ICON's director of product safety, Laurel Jenson, testified he is unaware of any studies done by ICON to determine how many people use the safety clip. (Jenson Depo., pp 48-49.) He also stated that he did not have any data or information on user compliance with the manual's clearance instructions. (*Id*., pp 79, 87.) [Appendix C, p 5.]

Further, Jensen was not aware of any other cases involving this model of treadmill, or involving any substantially similar model, of a person being pinned at the back of a treadmill (Apx G, p 88). The factors here were that Plaintiff was on medication, inexperienced with use of the treadmill, and was misusing it (no lanyard and insufficient rear clearance) (Apx G, pp 88-89).

Because Plaintiff offered no evidence that her misuse was a common practice and that ICON was aware or should have been aware that it was a common practice, and because ICON offered uncontroverted evidence to the opposite of those propositions, the trial court did not err when it determined that Plaintiff's particular misuse was not reasonably foreseeable to ICON. See *Iliades*, *supra* at 339; *Mach*, *supra*, 112 Mich App at 163; *Gootee*, *supra*, 712 F2d at 1064.

B. Plaintiff's Failure-to-Warn Theory Cannot Be Sustained.

Plaintiff takes the position on application to this Court, as she did below, that absent the applicability of the "misuse" defense, she should be able to get her case against ICON to a Jury on the theory that ICON failed to give her adequate warnings.

In Michigan, a manufacturer of a product has a duty to warn of dangers associated with intended uses or reasonably foreseeable misuses of the product. *Portelli v I R Constr Pods Co*, 218 Mich App 591, 598-599 (1996). However, the scope of a manufacturer's duty to warn is not unlimited. *Glittenberg v Doughboy Recreational Indus*, 441 Mich 379, 387-388 (1992). The elements for liability under a failure-to-warn theory have been described by the Michigan Supreme Court as follows:

> Basically, the manufacturer or seller must (a) have actual or constructive knowledge of the claimed danger, (b) have "no reason to believe that those for whose use the chattel as supplied will realize its dangerous condition," and (c) "fail to exercise reasonable care to inform [users] of its dangerous condition or of the facts which make it likely to be dangerous." [*Glittenberg*, *supra* at 389-390, quoting 2 Restatement Torts, 2d, § 388, pp 300-301.]

See also *Hollister v Dayton-Hudson Corp*, 201 F3d 731, 741 (CA6, 2000).

"[A] manufacturer or seller has no duty to warn of open and obvious dangers connected with an otherwise nondefective product." *Glittenberg* at 390. See also MCL 600.2948(2) ("A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action"). Moreover, there is no duty to warn about uses of the product that are not reasonably foreseeable. *Trotter v Hamill Mfg Co*, 143 Mich App 593 (1985). See also MCL 600.2948(3) (no liability under a failure to warn theory "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").

Moreover, the duty to warn of a material risk **does not require a manufacturer to describe or warn of the specific types of injury that could result from that risk**. *Greene v A P Products Ltd*, 475 Mich 502, 510 (2006). See also *Glittenberg*, *supra* at 400 ("warnings that parse the risk are not required [because] [t]he general danger encompasses the risk of the specific injury sustained").

Finally, a plaintiff asserting a failure-to-warn claim must still establish causation. Where causation is lacking (e.g., where a warning would not have changed the circumstances), the question of a duty to warn need not be addressed. *Fisher v Kawasaki Heavy Indus, Ltd*, 854 F Supp 467, 472 (ED Mich, 1994).

In this case, ICON concedes that it had actual or constructive knowledge that, *inter alia*, persons can lose their balance and fall from a treadmill, and that it is more dangerous to a fallen user if the treadmill keeps operating, and that there is a material risk associated with positioning a treadmill without adequate rear clearance. Where Plaintiff's failure-to-warn case fails, however, are the second two elements. ICON had multiple reasons to believe that users of this the subject treadmill would appreciate those risks for themselves, and Plaintiff would have to prove that ICON had no such reasons. Further, Plaintiff cannot establish that ICON failed to use reasonable care to inform users of those risks.

The user's manual that ICON provided with the treadmill set forth specific notifications to users with regard to the material risks at issue in this case (and other risks as well). ICON had no duty to parse the specific ways in which a user could be hurt by not maintaining rear clearance (e.g., hit head on wall, be pinned between belt and wall, be propelled into sharp object), nor as to

all of the component risks that are embraced by the failure to always wear the clip attached to the safety key.

Plaintiff's theory that the warnings she needed should have been on the console is untenable. All thirty of the precautions set forth on pages 3 and 4 of Exhibit A are important. In order to put the warnings on the console that Plaintiff claims she needed, ICON would have had to know what risks a particular user was going to ignore, or put all 30 warnings on the console (which would likely lead to those warning decals being removed).

Here, Plaintiff was aware, by virtue of the center console decal, that there were precautions that ICON wanted a user to know and that those precautions were detailed in the user's manual. Plaintiff was well aware that she had not looked at the user's manual. Thus, she proceeded with conscious uncertainty i.e., she knew there were risks, she did not know (or claims to not know) what they were, and she knew that she did not know what they were. A designer/manufacturer of a product can make reasonable efforts to give warning of a material risk, but it has no power to force users to heed those warnings. For instance, ICON warns users to **always** wear the safety clip. But Plaintiff decided on her own that she did not need to wear it if she intended on going slow—this, despite the fact that she apparently did not know how to put the treadmill on a slow and steady speed and, instead, had elected to figure it out on the fly (so to speak).

On appeal, as she did below, Plaintiff focuses her criticism of ICON's warnings in accordance with positions staked out by her expert. Specifically, she claims: (1) that ICON's warnings did not describe the consequences that might befall a user who fails to adhere to the stated warnings; and (2) there should have been a removable tape reminding the installers to position the treadmill with adequate rear clearance.

First, given that Plaintiff admits that she did not read the owner's manual at all or otherwise apprise herself of the precautions set forth therein, it is clear that she could never establish the

causation element of a claim that the warnings failed to adequately parse the danger. See *Fisher, supra*, 854 F Supp at 472. Further, Plaintiff's assertion that ICON's warnings should have specified the consequences is exactly the opposite of what the Michigan Supreme Court has stated. "[T]he law does not impose a duty upon a manufacturer to warn of all conceivable ramifications of injuries that might occur from the use or foreseeable misuse of the product." *Glittenberg*, 441 Mich at 402. "[W]arnings that parse the risk are not required. The general danger encompasses the risk of the specific injury sustained." *Id*., at 400. Moreover, this rule just makes logical sense inasmuch as any effort to identify the specific injuries that could occur might tend to implicitly exclude others. For instance, if the warnings that accompanied this treadmill had stated that not complying with the clearance requirement could result in an abradement injury, another user who falls and hits his head on the wall might have reason to claim that he thought the clearance was required in order to abate a different kind of risk.

Second, the claim that ICON should have warned the installers to not ignore the rear clearance requirement is particularly specious. MCL 600.2947(4) prohibits any liability to ICON for allegedly failing to give adequate warning to a "sophisticated user," and MCL 600.2945(j) defines as sophisticated user a "a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect." One would expect that those who install treadmills for a living are knowledgeable about their properties. Therefore, ICON cannot be liable on Plaintiff's claim that the warnings in its user's manual did not reach the installers. Further, this treadmill model is designed to be portable, i.e., to be rolled out and unfolded when used, and then folded up and rolled away when not in use. (See Apx DB, p 20.) It is unlikely that installers would know where the customer would ultimately be using the treadmill, or that any warning to the installers (rather than the user) would be given effect each time a portable treadmill is repositioned.

Consequently, the evidence clearly establishes that ICON used reasonable efforts to inform users of the material risks associated with use of the subject treadmill. Accordingly, even if ICON was not entitled to the "misuse" defense, ICON would nevertheless be entitled to summary disposition on a failure-to-warn theory and thus the trial court should be affirmed. See *Taylor v Laban*, 241 Mich App 449, 458 (2000) (the Court of Appeals will not reverse a lower court that reaches the right result for wrong reasons).

C. The Dissenting Court of Appeals Opinion Is a Logically Flawed Exercise of Result-Oriented Reasoning.

Plaintiff comes to this Court invigorated by the dissenting Court of Appeals opinion (Apx B), which (in that portion addressed to ICON's potential liability) contains at least six logical fallacies that evince a strained and result-oriented exercise of reasoning.

First, the dissent considers each component of misuse in isolation. That is a mistake, because this Court's precedent tells us that the specific misuse that occurred is what must be considered. See *Iliades, supra*, 501 Mich at 340 ("the question for purposes of foreseeability is whether [the defendant] knew or should have known of [the] particular misuse"). Where, as here, there are redundant safety features that Plaintiff had to disregard in order for her injury to occur, it is error to only consider the foreseeability of any one component of misuse. The pertinent question is whether ICON should have expected that it would be a common practice for consumers to simultaneously engage in all of the component aspects of Plaintiff's misuse that had to each occur in order for her injury to happen.

Second, the dissent discounts Plaintiff's failure to read the operating instructions as not a "use" of the treadmill– which is a strawman argument that relies on a distortion of ICON's and the three other judge's position. It is not misuse of a treadmill to merely not read the instructions. It is using a treadmill when you know that you do not know how to do so, and in the face of a label

telling you to read the instructions, that constitutes the misuse. The undersigned has never learned to fly a plane—and that does not constitute misuse of a plane. But if the undersigned jumped into the cockpit of a plane and took it up for a spin (without knowing how), that would constitute misuse. See MCL 600.2945(e) ("Misuse includes . . . uses contrary to a warning or instruction provided by the manufacturer, . . . and uses other than those for which the product would be considered suitable by a reasonably prudent person . . .").

Third, the dissent also wholly ignores that this was a portable treadmill that was designed to be repositioned with each use, and simply declares it to be foreseeable that it would be initially positioned without adequate rear clearance and used in that position by a consumer despite contrary warnings from the manufacturer (which is analogous to tripping over your own bicycle and blaming the person who delivered it for having placed it in an inconvenient location). The fact that the dissenting judge would ignore that factual context does not make the trial court's view of the evidence *clearly erroneous*.

> "While [the "clearly erroneous"] standard gives the appellate judge more latitude than when reviewing a trial by jury, it does not authorize a reviewing court to substitute its judgment for that of the trial court; **if the trial court's view of the evidence is plausible, the reviewing court may not reverse**." [*Beason v Beason*, 435 Mich 791, 805 (1990) (emphasis supplied).]

Fourth, the dissent accepts without question that a marketing image that Plaintiff's counsel downloaded from an ICON website conclusively establishes that ICON should have expected that users of this treadmill would not wear the safety lanyard. Apparently, the fact that discovery had closed, and Plaintiff offered no evidence at all other than the marketing image, was no impediment to the dissent in rejecting all other reasonable alternatives for why the person in the image was not wearing the lanyard (e.g., for the same reason there are no front-seat head rests in most interior automobile scenes on television) and concluding that not using the lanyard was foreseeable to ICON. But conjecture does not create a triable issue of fact. See *Craig v Oakwood Hosp*, 471

Mich 67, 87-88 (2004) (an explanation that is merely consistent with known facts, but which is not deducible from them as a reasonable inference by excluding other plausible explanations, does not present a jury-submissible theory).[5]

Moreover, even if Plaintiff's conjecture as to the import of the marketing image was sufficient to create a question of fact, the trial court judge was the trier of fact (by mandate of MCL 600.2947[2]) on that issue, and the trial court specifically rejected Plaintiff's position. Thus, the dissent is doing more than viewing the image as creating an issue of fact. The dissent is effectively saying that the single image is such conclusive evidence on the issue of foreseeability that the finder-of-fact's resolution of the question was clearly erroneous. That is not a sustainable conclusion. See *Beason, supra*, 435 Mich at 805. And more importantly, as recognized by the trial court:

> [N]othing in the picture indicates it is acceptable for users to not read the instruction manual nor does it show the runner using the treadmill with inadequate rear clearance—in fact, [Plaintiff] has completely failed to address whether ICON knew or should've known that users were ignoring the clearance instruction. [Apx C, p 5.]

Fifth, the dissent simply declares that all of Plaintiff's other unforeseeable acts that contributed to her injury (e.g., being on medications that cause dizziness, and relying on her husband to learn the operating instructions but electing to use the treadmill while he was out on a

[5] In point of fact, it is not just on the issue of "causation" that speculation and conjecture are insufficient to create a jury submissible question, but rather, no issue necessary to a judgment can be established by conjecture. See *Highland Park v Grant-Mackenzi Co*, 366 Mich 430, 437 (1962) ("A judgment may not be based upon speculation or conjecture, however plausible."); *Michigan Aero Club v Shelley*, 283 Mich 401, 410 (1938) ("The mere happening of an accident raises no presumption of negligence. . . . Judgment cannot be based upon conjecture."); *Karbel v Comerica Bank*, 247 Mich App 90, 97 (2001) ("parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing s genuine issue of material fact . . ."); *Libralter Plastics, Inc, v Chubb Group of Ins Cos*, 199 Mich App 482, 486 (1993) (same); *McCube v Meijer, Inc*, 156 Mich App 561, 563 (1986) (same).

brief errand) go only to her allocation of fault and not to whether her particular misuse was reasonably foreseeable to ICON. But why? It is often the case in the law that the same evidence is relevant for multiple reasons. See MRE 105. Because the foreseeability of misuse is determined by looking at the specific conduct that occurred, every aspect of Plaintiff's misuse is initially relevant to whether ICON is shielded from liability by MCL 600.2947(2).[6] Indeed, a consumer's negligent use of a product is one of the statutory definitions of misuse (i.e., "uses other than those for which the product would be considered suitable by a reasonably prudent person", MCL 600.2945[e]). Only **if** it is first determined that ICON does not get the protection of the misuse defense would that same conduct **then** be relevant to her allocation of fault.

Sixth, the dissent believes that, if ICON is not shielded from liability by the misuse defense, then it is up to a jury to determine whether ICON's warnings were adequate. But that conclusion depends on a complete abdication of the responsibility to critically examine Plaintiff's theories as to why the warnings that ICON indisputably provided were not adequate. As set forth earlier, a warning to always wear the safety lanyard, or to always provide a minimum distance of rear clearance, is not (as matter of law) inadequate because said warning does not list all of the bad consequences that could occur from not heeding the warning. *Greene*, 475 Mich at 510; *Glittenberg, supra*, 441 Mich 400. Moreover, the notion that ICON had a duty to Plaintiff to give a separate warning regarding placement to professional installers is specious for multiple reasons–

[6] Perhaps the dissent was influenced to only look at the three components of misuse recognized by the trial court as sufficient to support ICON's misuse defense, rather than the other components of Plaintiff's misuse that have been consistently advanced by ICON. But an appellee is not required to bring a cross-appeal in order to advocate alternative bases for affirmance. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41 (1994); *In re Herbach Estate*, 230 Mich App 276, 284 (1998). While the three components of misuse recognized by the trial court are sufficient to allow ICON to successfully invoke the misuse defense, foreclosing ICON from invoking that defense necessarily requires examining the entire panoply of acts that comprised the components of Plaintiff's particular misuse.

not the least of which is that the subject treadmill was not designed to remain and be used wherever it was first positioned. This portable treadmill could have initially been folded up and placed in a closet. With each use, Plaintiff would be expected to position it with adequate clearance– had she read the user manual.

CONCLUSION and RELIEF REQUESTED

The trial court properly determined that Plaintiff misused the treadmill and that her particular misuse was not reasonably foreseeable to ICON (i.e., it was not a common practice by users of the treadmill and one of which ICON was, or should have been, aware). Therefore, the Court of Appeals correctly affirmed the trial court's grant of Summary Disposition to ICON on the trial court's reasoning. Alternatively, Plaintiff's failure-to-warn claim fails of its own accord because the evidence clearly establishes that ICON used reasonable efforts to inform users of the material risks associated with use of the subject treadmill. Consequently, this Court should DENY leave to appeal with respect to the product liability aspect of Plaintiff's action because the judgment of the Court of Appeals was not clearly erroneous and imposes no material injustice.

WHEREFORE, Defendant-Appellee ICON Health & Fitness, Inc. respectfully requests that this Honorable Court DENY Plaintiff's Application for Leave to Appeal with respect to Plaintiff's product liability claim or, alternatively, affirm the Judgment of the Court of Appeals.

Respectfully submitted,

/s/ Lincoln G. Herweyer
Lincoln G. Herweyer (P55742
Attorney for Defendant-Appellee ICON
35054 Twenty-Three Mile Rd., Suite 115
New Baltimore, Michigan 48047
(586) 716-1562
Lgherweyer@aim.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Document contains 9,285 words, in those sections described by MCR 7.212(C)(6)-(8).

I declare that the statements above are true to the best of my information, knowledge, and belief.

/s/ Lincoln G. Herweyer
Lincoln G. Herweyer

PROOF OF SERVICE

The undersigned certifies that the foregoing Supplemental Brief, together with an accompanying Supplemental Appendix, was served upon all of the parties to this appeal on September 21, 2023 by service on one or more of their Counsel by:

By:_____U.S. Mail _____Hand Delivered _____Facsimile
Express Mail_____ MiFile e-service_XX__

I declare that the statements above are true to the best of my information, knowledge, and belief.

/s/ Lincoln G. Herweyer
Lincoln G. Herweyer