

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

JACKSON COUNTY, MISSOURI, individually and on
behalf of a class of others similarly situated,

Plaintiff,

vs.

TRINITY INDUSTRIES, INC. and TRINITY HIGHWAY
PRODUCTS, LLC,

Defendants.

Case No. 1516-CV23684

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES

Defendants Trinity Industries, Inc. (“Trinity Industries”) and Trinity Highway Products, LLC (“Trinity Highway”) (together, “Defendants”), by and through their undersigned counsel, hereby answer the Class Action Petition (the “Petition”) filed on November 5, 2015, by Plaintiff Jackson County, Missouri (“Plaintiff”). Defendants deny any and all allegations in the Petition that are not specifically and expressly admitted herein.

INTRODUCTION

1. Paragraph 1 consists of Plaintiff’s characterization of this action, to which no response is required. To the extent Plaintiff’s characterization implies that Defendants have engaged in any wrongful conduct, those allegations are denied. Defendants admit that Trinity Highway manufactures and sells the ET Plus guardrail end terminal system (“ET Plus System”), but deny that it is defective, unsafe, or unreasonably dangerous. Defendants deny the remaining allegations in Paragraph 1.

2. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 2 and therefore deny the allegations in Paragraph 2.

3. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 3 and therefore deny the allegations in Paragraph 3. The allegations in Paragraph 3 also contain legal conclusions to which no response is required.

4. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 4 and therefore deny the allegations in Paragraph 4.

PARTIES

5. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 5 and therefore deny the allegations in Paragraph 5.

6. Defendants admit that Trinity Industries is a Delaware corporation with a principal place of business located at 2525 Stemmons Freeway, Dallas, TX 75207 and that Trinity Industries can be served with process through its registered agent CT Corp. System, 350 N. St. Paul Street, Suite 2900, Dallas, Texas 75201. Defendants admit that Trinity Highway Products, LLC is a wholly-owned subsidiary of Trinity Industries. Defendants deny the remaining allegations in Paragraph 6. Defendants deny that Trinity Industries is a proper party to this suit.

7. Defendants admit that Trinity Highway is a Delaware limited liability company with a principal place of business located at 2525 Stemmons Freeway, Dallas, TX 75207 and that Trinity Highway can be served with process through its registered agent CT Corp. System, 350 N. St. Paul Street, Suite 2900, Dallas, Texas 75201. Defendants admit that Trinity Highway manufactures and sells the ET Plus System and other roadway safety products. Defendants deny the remaining allegations in Paragraph 7.

8. Defendants deny the allegations in Paragraph 8.

9. Defendants deny the allegations in Paragraph 9.

JURISDICTION AND VENUE

10. The allegations in Paragraph 10 contain legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 10.

11. The allegations in Paragraph 11 contain legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 11.

12. The allegations in Paragraph 12 contain legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 12.

13. The allegations in Paragraph 13 contain legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 13.

14. The allegations in Paragraph 14 contain legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 14.

FACTS COMMON TO ALL COUNTS¹

15. Defendants deny the allegations in Paragraph 15.

16. Defendants admit that guardrails are products designed to help prevent motorists who have left the roadway from crashing into trees, plunging into ravines, or veering into oncoming traffic. Defendants deny the remaining allegations in Paragraph 16.

17. Defendants admit that guardrail end terminal systems are designed to help absorb and dissipate the energy of a vehicle upon impact when impacted under certain conditions. Defendants deny the remaining allegations in Paragraph 17.

¹ To the extent that the subheadings in the Petition constitute allegations, Defendants deny all allegations made in the subheadings that appear in the Petition. To the extent that the photographs or diagrams in the Petition constitute allegations, Defendants deny all allegations made in the photographs or diagrams that appear in the Petition.

18. Defendants admit that guardrail end terminal systems are designed to help absorb and dissipate the energy of a vehicle upon impact when impacted under certain conditions. Defendants deny the remaining allegations in Paragraph 18.

19. Defendants admit that the ET Plus System is designed to help absorb and dissipate the energy of a vehicle upon impact when impacted under certain conditions. Defendants admit that when hit head-on under certain conditions specified by National Cooperative Highway Research Program's ("NCHRP") Report 350, the ET Plus System flattens and bends the guardrail away from the vehicle, which helps to dissipate the kinetic energy of the vehicle after impact. Defendants deny the remaining allegations in Paragraph 19.

20. Defendants admit that the ET Plus System has more than forty component parts, including the ET Plus extruder head, w-beam guardrail, and posts. Defendants deny the remaining allegations in Paragraph 20.

21. Defendants admit that when hit head-on under certain conditions specified by NCHRP Report 350, the ET Plus extruder head is designed to flatten and bend the guardrail away from the vehicle, which helps to dissipate the kinetic energy of the vehicle after impact. Defendants deny the remaining allegations in Paragraph 21.

22. Defendants deny the allegations in Paragraph 22.

23. Defendants admit that the Federal Highway Administration ("FHWA") determined that the ET-2000 was acceptable for use on the national highway system and eligible for reimbursement under the Federal-aid Highway Program. Defendants admit that Trinity Industries sold the ET-2000. Defendants deny the remaining allegations in Paragraph 23.

24. Defendants admit that the ET-2000 was a predecessor to the ET Plus System. Defendants admit that in January 2000, the FHWA approved the ET Plus System for use on the

national highway system and as eligible for reimbursement under the Federal-aid Highway Program. Defendants admit that Trinity Highway manufactured, marketed, and sold the ET Plus System. Defendants deny the remaining allegations in Paragraph 24.

25. Defendants deny the allegations in Paragraph 25.

26. Defendants deny the allegations in Paragraph 26.

27. Defendants deny the allegations in Paragraph 27.

28. Defendants deny the allegations in Paragraph 28.

29. Defendants deny the allegations in Paragraph 29.

30. Defendants deny the allegations in Paragraph 30.

31. Defendants deny the allegations in Paragraph 31.

32. Defendants deny the allegations in Paragraph 32.

33. Defendants deny the allegations in Paragraph 33.

34. Defendants deny the allegations in Paragraph 34.

35. Defendants deny the allegations in Paragraph 35.

36. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 36 that Jackson County and the Class Members have removed and replaced ET Plus Systems from roadways they maintain and therefore deny those allegations in Paragraph 36. Defendants deny the remaining allegations in Paragraph 36.

37. Defendants deny the allegations in Paragraph 37.

38. Defendants admit that on February 14, 2012, representatives from Trinity Highway and the Texas A&M Transportation Institute met with Nicholas Artimovich from the FHWA's Office of Engineering and discussed the changes that Joshua Harman, a Trinity Highway competitor, alleged had been made to the ET Plus System in the *qui tam* case captioned

Harman v. Trinity Industries, Inc., et al., 2:12-cv-0089-JRG (E.D. Tex.) that Harman filed under seal on March 6, 2012, including the change from five-inch to four-inch guide channels attached to the ET Plus extruder head. Defendants deny the remaining allegations in Paragraph 38.

39. Defendants deny the allegations in Paragraph 39.

40. Defendants deny the allegations in Paragraph 40.

CLASS ACTION ALLEGATIONS

41. Paragraph 41 contains Plaintiff's characterization of this action to which no response is required. To the extent that a response is required, Defendants deny the allegations in Paragraph 41.

42. Paragraph 42 contains Plaintiff's characterization of this action to which no response is required. To the extent that a response is required, Defendants deny the allegations in Paragraph 42.

43. Paragraph 43 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 43.

44. Paragraph 44 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 44.

45. Paragraph 45 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 45.

46. Paragraph 46 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 46.

47. Paragraph 47 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 47.

48. Paragraph 48 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 48.

49. Paragraph 49 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 49.

50. Paragraph 50 contains legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 50.

CAUSES OF ACTION

51. Defendants incorporate their responses to Paragraphs 1 through 50 of the Petition as though fully stated herein.

52. Defendants admit that Trinity Highway manufactured and sold the ET Plus System. Defendants deny the remaining allegations in Paragraph 52.

53. Defendants deny the allegations in Paragraph 53.

54. Defendants deny the allegations in Paragraph 54.

55. Defendants deny the allegations in Paragraph 55.

56. Defendants deny the allegations in Paragraph 56.

57. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 57 that Jackson County and the Class Members have removed and replaced ET Plus Systems from roadways they own and maintain and therefore deny those allegations in Paragraph 57. Defendants deny the remaining allegations in Paragraph 57.

58. Defendants deny the allegations in Paragraph 58 and further deny that Plaintiff is entitled to any relief in this action.

59. Defendants incorporate their responses to Paragraphs 1 through 58 of the Petition as though fully stated herein.

60. Defendants admit that Trinity Highway sold the ET Plus System. Defendants deny the remaining allegations in Paragraph 60.

61. Defendants deny the allegations in Paragraph 61.

62. Defendants deny the allegations in Paragraph 62.

63. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 63 that Jackson County and the Class Members have removed and replaced ET Plus Systems from roadways they own and maintain and therefore deny those allegations in Paragraph 63. Defendants deny the remaining allegations in Paragraph 63.

64. Defendants deny the allegations in Paragraph 64 and further deny that Plaintiff is entitled to any relief in this action.

65. Defendants incorporate their responses to Paragraphs 1 through 64 of the Petition as though fully stated herein.

66. Defendants admit that Trinity Highway sold the ET Plus System. Defendants deny the remaining allegations in Paragraph 66.

67. Defendants deny the allegations in Paragraph 67.

68. Defendants deny the allegations in Paragraph 68.

69. Defendants deny the allegations in Paragraph 69.

70. Defendants deny the allegations in Paragraph 70.

71. Defendants deny the allegations in Paragraph 71.

72. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 72 that Jackson County and the Class Members have removed and replaced ET Plus Systems from roadways they own and maintain and therefore deny those allegations in Paragraph 72. Defendants deny the remaining allegations in Paragraph 72.

73. Defendants deny the allegations in Paragraph 73 and further deny that Plaintiff is entitled to any relief in this action.

74. Defendants incorporate their responses to Paragraphs 1 through 73 of the Petition as though fully stated herein.

75. Defendants deny the allegations in Paragraph 75.

76. Defendants deny the allegations in Paragraph 76.

77. Defendants deny the allegations in Paragraph 77 and further deny that Plaintiff is entitled to any relief in this action.

AFFIRMATIVE DEFENSES

Without admitting any allegations asserted in the Petition except such allegations as are expressly admitted herein, Defendants assert the following affirmative defenses. Nothing stated in any of the following defenses constitutes a concession that Defendants bear any burden of proof on any issue on which they would not otherwise bear such burden. Moreover, by asserting these affirmative defenses, Defendants do not admit that the matters designated herein as “defenses” are not elements of the Plaintiff’s prima facie case on any of Plaintiff’s purported claims.

1. Plaintiff’s Petition fails to state a claim or cause of action upon which relief can be granted and should be dismissed with prejudice.

2. The ET Plus Systems were “state of the art” as defined by § 537.764 of the Missouri Revised Statutes. As a result, Trinity has no liability.

3. Plaintiff’s claims and causes of action are preempted by federal law and applicable federal regulations governing the product at issue, particularly by the formal rulemaking process that culminated in a final rule noted in Volume 58, No. 135 of the Federal Register, dated July 16, 1993, under which the FHWA added NCHRP Report 350 at paragraph 625.5(a)(13) of Title 23, Code of Federal Regulations. NCHRP Report 350 was subsequently removed to Section 16, paragraph(a)(12) of the Non-Regulatory Supplement to the Federal-Aid Policy Guide, subchapter G, part 625 (NS 23 CFR 625). The FHWA, an agency of the United States Department of Transportation, approves highway guardrail end terminal systems for use on the national highway system. For all of its guardrail end terminal systems, Trinity has utilized a pre-market approval process, which the FHWA made available to manufacturers of roadside safety equipment. Specifically, the FHWA issues letters or memoranda accepting highway products, including guardrail systems and end treatments, for use on the national highway systems and approving them as eligible for federal-aid reimbursement. Trinity complies with the FHWA’s safety standards and regulations with respect to a product’s pre-market approval. All of the guardrail end treatment systems that Trinity makes available for selection, purchase, use, placement, and installation, including the ET Plus Systems that were or are installed on the roadways owned or maintained by Plaintiff and all other members of the purported class, have been approved and accepted by the FHWA, pursuant to these federal safety standards and regulations.

4. All ET Plus Systems currently or previously installed on the roadways owned or maintained by Plaintiff and all other members of the purported class complied with the plans and

specifications of their purchasers; the entities that owned or maintained the roadways at issue, including Plaintiff; and the Missouri Highways and Transportation Commission (“MHTC”) and were inspected, approved, and accepted by such purchasers and entities. As a result, Plaintiff’s claims and causes of action are barred under the acceptance doctrine and within the meaning of *Bloemer v. Art Welding Co.*, 884 S.W.2d 55 (Mo. App. E.D. 1994) and related cases.

5. Plaintiff’s claims are barred because Defendants have at all times acted with due care and complied or substantially complied with all applicable statutes, regulations, and laws.

6. Some or all of the allegations and purported causes of action in the Petition are barred because the benefits of the design of the product outweigh any inherent dangers, if there are any, which Defendants deny.

7. Plaintiff has failed to make reasonable efforts to mitigate its alleged damages, including to the extent that Plaintiff has voluntarily incurred costs to remove and replace ET Plus Systems from roadways it owns or maintains, and any damages awarded to Plaintiff should be reduced according to the extent of such failure to mitigate.

8. Plaintiff’s alleged damages, if any, were caused in whole or in part by the acts or omissions of persons other than Defendants, over whom Defendants had no control, or by the superseding intervention of causes outside of Defendants’ control. These intervening, new, and/or contributing causes, include, but are not limited to:

- a. Prior damage to the products, including, for example, from prior crashes or impacts, and
- b. Failure to properly install, repair, and/or maintain the product.

9. In the event Defendants are held legally responsible to Plaintiff (any such responsibility Defendants expressly deny), the configuration or operational characteristics of the

products at issue were changed, altered, or modified by affirmative conduct of some person in a manner that Defendants could not have reasonably foreseen would occur in the intended or foreseeable use of the product.

10. The products at issue were out of the control of Defendants over material periods of time. During those periods, Defendants had no control over the installation, maintenance, handling, use, or control of the products. If there is or was any defect or deficiency in any of the products installed on the roadways owned or maintained by Plaintiff or other members of the purported class (such defect or deficiency Defendants expressly deny), such defect or deficiency did not relate to the original design, manufacture, or sale of the products, but, on the contrary, is the result of acts or omissions on the part of others for whom Defendants are not and cannot be responsible.

11. Defendants assert all applicable limits on prejudgment and postjudgment interest.

12. Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations, including § 516.120 of the Missouri Revised Statutes.

13. Plaintiff's claims are barred in, in whole or in part, by the doctrine of laches.

14. Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, estoppel, and/or acquiescence to the extent that Plaintiff has, through its actions, omissions, or course of conduct, waived its right to recovery, released its claims against Defendants, or acquiesced in, approved, consented to, authorized, and/or ratified Defendants' alleged conduct.

15. Plaintiff's claims are barred, in whole or in part, by the intervening and/or superseding acts of third parties.

16. Plaintiff's claims are barred to the extent Defendants' acts or omissions were not the direct, proximate, or actual cause of any alleged injuries or damages that Plaintiff allegedly

incurred or suffered, including to the extent that Plaintiff has voluntarily chosen to remove and replace ET Plus Systems from roadways it owns or maintains.

17. Plaintiff's claims are barred to the extent the damages and/or losses Plaintiff allegedly suffered, if any, were a result of Plaintiff's own conduct or omissions, including to the extent that Plaintiff has voluntarily chosen to remove and replace ET Plus Systems from roadways it owns or maintains.

18. Plaintiff is not entitled to any recovery because any alleged acts or omissions by Defendants were made in good faith in conformity with and reliance on applicable statutes, administrative regulations, orders, rulings, approvals or interpretations, or administrative practice or enforcement policies.

19. Plaintiff's claims are barred because neither Plaintiff, nor anyone else, suffered a loss or injury as a result of any action or inaction of Defendants.

20. Plaintiff's alleged damages, if any, are barred to the extent Plaintiff has received payment and/or reimbursement for the purchase or installation of any ET Plus Systems from the state or federal government or any branch or department thereof or from any other third party.

21. Plaintiff's claims are barred because they were not authorized or commenced in accordance with applicable laws relating to claims brought by a County.

22. Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to put the ET Plus System to its reasonably expected use in that Plaintiff failed to properly install, repair, and/or maintain the product.

23. Plaintiff's claims are barred, in whole or in part, because Defendants did not know, or in the exercise of reasonable care, could not have known of the dangerous condition

(which Defendants expressly refute) caused by Plaintiff's failure to put the ET Plus System to its reasonably expected use.

24. With respect to any claim of negligence, a percentage of fault may be assessed against Plaintiff for its negligence directly and proximately contributing to Plaintiff's losses or damages.

25. Defendants assert that they are not jointly and severally liable for any judgment to the extent that they are found to bear less than 51% of the total fault.

26. Plaintiff may not be the real party in interest for some or all of the damages it seeks in this matter.

27. Plaintiff's claims are barred, in whole or in part, pursuant to common law and § 537.765.1 of the Missouri Revised Statutes, by Plaintiff's comparative fault or contributory negligence, including in failing to properly install, repair, and/or maintain the product.

28. Plaintiff's claims are barred in whole or in part because Plaintiff knowingly assumed any and all applicable risks by affirmatively making a decision to purchase and install guardrail end terminals on roadways it owns or maintains. Plaintiff's assumption of the risk constitutes a total or partial bar to any and all recovery by Plaintiff.

29. Plaintiff's claims are barred, in whole or in part, because the ET Plus System contained an adequate warning, which Plaintiff failed to heed.

30. Defendants are not liable to Plaintiff because (1) the end users of the ET Plus Systems, including Plaintiff, were sophisticated users; (2) Defendants provided adequate warnings to Plaintiff and/or the immediate purchasers of the ET Plus System, who were sophisticated; and (3) Defendants reasonably relied on the immediate purchasers to convey appropriate warnings to downstream users who would encounter the product.

31. Plaintiff's claims are barred, in whole or in part, to the extent Defendants have disclaimed all consequential, indirect, special, or cover damages.

32. Plaintiff's claims are barred, in whole or in part, by Missouri's economic loss doctrine because Plaintiff seeks to recover solely the cost of removing and replacing the ET Plus Systems installed on the roadways it allegedly owns and maintains, which costs are purely economic losses that cannot be recovered in tort.

33. Plaintiff's claims are barred, in whole or in part, by Missouri's economic loss doctrine because the ET Plus System has not damaged other property belonging to Plaintiff, and Plaintiff has unequivocally disclaimed any damage to other property.

34. Plaintiff's declaratory judgment claim is barred because an actual controversy that is ripe for adjudication does not exist here. Specifically, the alleged ET Plus System defects have not actually manifested and caused injury to Plaintiff, and Plaintiff is not prohibited by any law, contract, or other instrument or duty from removing and replacing the ET Plus Systems that are on the roadways it owns and maintains.

35. Plaintiff's declaratory judgment claim is barred because it is wholly duplicative of Plaintiff's strict product liability claim, which fails as a matter of law.

36. Plaintiff's claims are barred because Plaintiff has not suffered any damages as a result of the ET Plus System's alleged defects. Specifically, Plaintiff has not alleged that any ET Plus System on its roads has actually malfunctioned or otherwise manifested any defect and caused Plaintiff injury.

37. Plaintiff lacks standing to pursue the claims in its Petition because Plaintiff has failed to allege any injury, whether threatened or actual. Specifically, Plaintiff has not alleged that any ET Plus System on its roads has actually malfunctioned or otherwise manifested any

defect and caused Plaintiff injury. Plaintiff has also failed to allege that the alleged defects will imminently manifest and cause imminent harm to Plaintiff.

JURY DEMAND

Defendants request a trial by jury on all issues so triable.

RESERVATION OF RIGHTS

Defendants hereby give notice that they intend to rely on any additional affirmative defenses that become available or apparent during discovery or based on other developments in the action and, thus, reserve the right to amend their Answer to assert additional defenses.

Dated: May 12, 2017

Respectfully submitted,

/s/ James D. Griffin

James D. Griffin MO #33370
SCHARNHORST AST KENNARD GRIFFIN, PC
1100 Walnut, Suite 1950
Kansas City, MO 64106
Phone: (816) 268-9400
Facsimile: (816) 268-9409
E-mail: jgriffin@sakg.com

Michelle A. Reed (*pro hac vice*)
Elizabeth D. Scott (*pro hac vice*)
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Avenue, Suite 4100
Dallas, TX 75201
Tel: (214) 969-2800
Fax: (214) 969-4343
mreed@akingump.com
edscott@akingump.com

Brian E. Robison (*pro hac vice*)
Andrew P. LeGrand (*pro hac vice*)
Christine Demana (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
Tel: (214) 698-3100
Fax: (214) 571-2900
brobison@gibsondunn.com
alegrand@gibsondunn.com
cdemana@gibsondunn.com

*Counsel for Defendants Trinity Industries, Inc. and
Trinity Highway Products, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 12, 2017, the foregoing instrument was served via the Court's electronic filing system on counsel of record, who have consented to electronic service of the same.

/s/ James D. Griffin