

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

EFRAIN HILARIO AND GABINA)
MARTINEZ FLORES, As Surviving)
Parents of ERIK HILARIO, Deceased,)
ROGER KIRSCHENBAUM, as the)
Administrator of the Estate of ERIK)
HILARIO, Deceased,)

Plaintiffs,)

vs.)

CIVIL ACTION FILE
NO. 12EV015400J

NEWELL RECYCLING OF ATLANTA,)
INC.; NEWELL EQUIPMENT LEASING,)
LLC,)

Defendants.)

SECOND AMENDED COMPLAINT

COME NOW Plaintiffs, Efrain Hilario and Gabina Martinez Flores, As Surviving Parents of Erik Hilario, Deceased, Roger Kirschenbaum, as the Administrator of the Estate of Erik Hilario, Deceased, by and through the undersigned counsel and file this Second Amended Complaint against the above-named Defendants, and show this Honorable Court the following.

INTRODUCTION

Plaintiffs filed their initial Complaint on July 19, 2012, naming as Defendants Newell Recycling of Atlanta, Inc., Newell Equipment Leasing, LLC, Newell Recovery, LLC and Newell Transportation, LLC. Plaintiffs filed their First Amended Complaint on July 24, 2012 to correct a typographical error regarding the name of Defendant Newell Equipment Leasing, LLC. Subsequent to that, Newell Recovery and Newell Transportation were dropped from the case.

Plaintiffs are filing this second amended complaint based on discovery in this action, to clarify the facts and claims remaining Defendants are liable for, including:

- (1) Premises liability;
- (2) Product liability and/or negligent design;
- (3) General negligence, including negligent maintenance, operations, and instruction;
- (4) Negligence *per se*; and
- (5) Punitive damages.

PARTIES, JURISDICTION & VENUE

1.

Plaintiffs Efrain Hilario and Gabina Martinez Flores bring this action for wrongful death as the surviving parents of Erik Hilario. Plaintiff, Roger Kirschenbaum, brings this action for personal injury and punitive damages as the personal representative of Erik Hilario, deceased. Plaintiffs are subject to the jurisdiction of this Court. Plaintiffs state their intention to bring each and every claim for damages permissible under Georgia law, including compensatory and punitive damages as proven by the evidence.

2.

Erik Hilario died intestate on January 6, 2011. At the time of his death, Erik Hilario was a resident of the State of Georgia.

3.

Defendant Newell Recycling of Atlanta, Inc., (hereinafter “Defendant(s)” or “Newell Recycling of Atlanta”) is a company authorized to transact business in the State of Georgia and is subject to the jurisdiction and venue of this Court. Service can be made

on said Defendant by serving its Registered Agent, Dennis Doherty, 1359 Central Avenue, East Point, Georgia 30344, or through its counsel of record in this action.

4.

Defendant Newell Recycling of Atlanta has been properly served with process in this action.

5.

Defendant Newell Equipment Leasing, LLC., (hereinafter “Defendant(s)” or “Newell Equipment”) is a company authorized to transact business in the State of Georgia and is subject to the jurisdiction and venue of this Court. Service can be made on said Defendant by serving its Registered Agent, Dennis Doherty, 1359 Central Avenue, East Point, Georgia 30344.

6.

Defendant Newell Equipment has been properly served with process in this action.

7.

Venue is proper in this Court.

8.

Jurisdiction is not proper in federal court by removal as one or more of the Defendants is a Georgia citizen and resident.

OPERATIVE FACTS

9.

On January 6, 2011, Erik Hilario was working as an employee of Newell Recycling, LLC at the premises located at 1359 Central Avenue, East Point, Georgia.

10.

Defendant Newell Recycling of Atlanta controlled, owned, occupied, operated, inspected, and/or managed the premises located at 1359 Central Avenue, East Point, Georgia. Defendant Newell Equipment was and is also an occupier of the premises.

11.

At all relevant times Erik Hilario was an invitee of Newell Recycling of Atlanta on the premise for a lawful purpose.

12.

At or about 11:14 p.m. on January 6, 2011, Erik Hilario (“Erik”) was operating a loader on Newell Recycling of Atlanta’s premises. Erik was moving scrap and debris across a paved area. Flammable material had collected in the area. Suddenly and without warning, the flammable material ignited. The loader and Erik Hilario became engulfed in flames.

13.

The fire resulted from gasoline spilled on the ground.

14.

Erik Hilario eventually died as a result of the fire and his severe burns and inhalation of products of combustion.

15.

Sawdust or some similar material was thrown onto Erik Hilario in an effort to put out the flames. There were inadequate precautions or devices in place to guard against and extinguish fire.

16.

Newell Equipment owned the loader Erik Hilario was operating. Both Defendants were jointly responsible for the maintenance and condition of the loader.

17.

Erik Hilario experienced fright, terror and conscious pain and suffering prior to his death as a result of the fire and being burned alive.

18.

Erik Hilario burned to death due to Defendants' negligence.

19.

As owner of the premises, Newell Recycling of Atlanta had a non-delegable duty pursuant to O.C.G.A. § 51-3-1 to exercise ordinary care in keeping the premises safe.

20.

As an occupier of the premise, and as owner of the involved loader, Defendant Newell Equipment shares responsibility to keep the premises safe.

21.

Defendants breached their duties.

22.

Defendants are liable for failing to keep the premises safe and for the dangerous conditions and processes on the premises that led to this fire.

23.

At the time of the incident, the premise where Erik Hilario was working was not in a safe condition.

24.

Defendants were responsible for the maintenance, inspection, operation, instruction, and safety of the front-end loader. Defendants were negligent regarding the use, maintenance, and condition of the loader.

25.

Defendants were jointly responsible for the loader equipment condition. The loader had lighting and hydraulic problems which Defendants negligently failed to repair prior to this fire.

26.

Defendant Newell Recycling of Atlanta was responsible for setting policy and procedures for de-fueling automobiles for recycling.

27.

Defendant Newell Recycling of Atlanta was negligent, and that negligence includes failing to ensure that sources of flammable material were removed or otherwise safely handled.

28.

Defendant Newell Recycling of Atlanta was responsible to inspect and maintain the area where Erik Hilario was working and to keep it in a reasonably safe condition.

29.

Defendant Newell Recycling of Atlanta was negligent, including failing to keep the area free of defects that would allow flammable materials to accumulate on the ground.

30.

Defendant Newell Recycling of Atlanta was responsible for having proper equipment and procedures to mitigate and eliminate accumulation of flammable materials.

31.

Defendants breached their respective duties.

THE PUNCHER PROCESS

32.

The dangerous and defective equipment and processes identified above involve a “puncher” for draining gasoline from automobiles prior to recycling.

33.

The puncher consisted of a metal spike mounted on steel beams over a basin that ultimately was designed to drain automotive fluids, including gasoline, into storage tanks. The process was to pick up a car with a crane; position it in the air with the gas tank over the top of the spike; drop the vehicle down one or more times on the spike; and let the gasoline flow out and drop into the basin. For purposes of this Second Amended Complaint, the term “puncher” means both the puncher apparatus itself, as well as the associated location, processes and implementation.

34.

The puncher was designed, fabricated and installed in approximately 2008-2009 at the Newell Recycling of Atlanta facility in East Point.

35.

Defendant Newell Recycling of Atlanta negligently designed and implemented the puncher product, equipment, and process.

36.

The puncher design, location, processes and implementation were defective, unreasonably dangerous, and negligent, which led to and proximately caused the dangerous conditions and fire that resulted in Erik Hilario's pain, suffering, and wrongful death. Specifically, the design, process and implementation led to foreseeable spills of gasoline and exposure to vapors in the area of the puncher. The proximity of these spills and vapor to a scrap pile, which was pushed along the concrete with a loader on a daily basis, compounded the fire hazard and unreasonable danger.

37.

Defendant Newell Recycling of Atlanta is strictly liable under O.C.G.A. § 51-1-11 because the risks inherent in the design of the puncher outweighed any utility of the chosen design, thereby rendering the puncher defective, unreasonably dangerous and not reasonably suited to the use for which it was intended.

38.

Defendant Newell Recycling of Atlanta owed a duty to those on the premises who could reasonably be affected by the puncher, including Erik Hilario, to exercise reasonable care to design, test, manufacture, inspect, and implement a puncher free of unreasonable risk of harm.

39.

At the time Defendant Newell Recycling of Atlanta implemented the puncher, Defendant could have foreseen and did, in fact, foresee the occurrence of fires from gasoline such as the one described in this complaint.

40.

Prior to the death of Erik Hilario, other fires occurred on or around the puncher, providing further notice of the dangers of the puncher.

41.

At the time Defendant Newell Recycling of Atlanta implemented the puncher, other reasonable alternative designs existed that were safer, and technologically and economically feasible.

42.

Defendant Newell Recycling of Atlanta failed to reasonably and adequately test and monitor the puncher.

43.

Defendant Newell Recycling of Atlanta failed to adequately warn and instruct.

44.

Defendant Newell Recycling of Atlanta is guilty of negligence *per se* for failing to consider or comply with applicable standards and regulations, including but not limited to OSHA machine safeguarding (29 CFR 1910.212); and fire codes (including NFP 30, and Georgia minimum fire safety standards, § 120-3-3 and 120-3-11).

45.

Defendant Newell Recycling of Atlanta and Erik Hilario's employer, Newell Recycling, LLC, are independent contractors as to one another.

46.

Defendant Newell Recycling of Atlanta contends that an employee of Newell Recycling, LLC, Anthony Eady, is at fault for the subject fire. Defendant Newell

Recycling of Atlanta is liable for any negligence it proves as to Newell Recycling, LLC or Anthony Eady, pursuant to O.C.G.A. § 51-2-5.

PROXIMATE CAUSE AND LIABILITY

47.

As a direct and proximate result of Defendants' above-referenced tortious acts and omissions, Erik Hilario sustained catastrophic injuries, conscious pain and suffering, became aware of his impending death, and ultimately died.

48.

Erik Hilario exercised ordinary, reasonable care under the conditions and circumstances then existing.

49.

Defendants knew of, or with the exercise of due care for the safety of their invitees, should have known of the dangerous and hazardous conditions existing on the premises and that said conditions were likely to result in injuries to and the death of invitees such as Erik Hilario.

50.

Defendants had actual knowledge of the dangerous and hazardous conditions.

51.

Defendants were and are negligent *per se*.

52.

Defendants' acts and omissions rise to the level of conscious indifference to consequences, such that punitive damages are appropriate. No cap on the amount of punitive damages applies pursuant to O.C.G.A. § 51-12-5.1(e)(1).

53.

Each of the foregoing tortious acts and omissions constitute an independent act of negligence on the part of Defendant(s) and one or more or all the above stated acts and omissions proximately caused the injuries to and death of Erik Hilario. Defendants are liable for the personal injuries and wrongful death of Erik Hilario and all damages recoverable under Georgia law.

54.

Plaintiffs Efrain Hilario and Gabina Martinez Flores, as surviving parents, claim general and special damages for all elements of the wrongful death of Erik Hilario, the measure of which is the full value of Erik Hilario's life.

55.

Plaintiff Efrain Hilario, as personal representative of Erik Hilario, states his intention to seek all compensatory, special, economic, general, punitive, and all other damages permissible under Georgia Law, including but not limited to:

- a) Personal injuries;
- b) Pain and suffering;
- c) Mental anguish, fright, shock, and terror; and
- d) Punitive damages pursuant to O.C.G.A. § 51-12-5.1.

56.

Plaintiffs are entitled to attorneys' fees and the expenses of litigation in that the actions on the part of Defendants as hereinabove described show that Defendants acted in bad faith in the transaction and dealings surrounding the incident. Defendants and their agents have been stubbornly litigious and have caused Plaintiffs unnecessary expense so

as to entitle Plaintiffs to the expenses of litigation and attorneys' fees as defined by O.C.G.A. § 13-6-11.

57.

WHEREFORE Plaintiffs pray for the following relief:

- (a) That summons issue requiring Defendants to appear as provided by law to answer this Complaint;
- (b) That Plaintiffs have a trial by jury;
- (c) That Plaintiffs have and recover all damages under Georgia law as set forth above;
- (d) That all costs be cast against Defendants; and
- (e) For such other and further relief as the Court shall deem just and proper.

Respectfully submitted this 17th day of September, 2014.

Respectfully submitted,
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LLC,)
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of *Plaintiffs*
Second Amended Complaint with the Clerk of Court using the LexisNexis File & Serve
system which will automatically send email notification of such filing to the following
attorneys of record:

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[Signature on following page]

This 17th day of September, 2014.

Respectfully submitted,
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