IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-00043-SCT

MARSHA R. HINTON AND THOMAS F. HINTON

v.

SPORTSMAN'S GUIDE, INC.

DATE OF JUDGMENT:	01/12/2018
TRIAL JUDGE:	HON. DAL WILLIAMSON
TRIAL COURT ATTORNEYS:	SAMUEL STEVEN McHARD LAWRENCE E. ABERNATHY, III LESLIE D. ROUSSELL MATTHEW D. MILLER MARK D. MORRISON BARRY B. SUTTON DORRANCE AULTMAN NICHOLAS KANE THOMPSON VICK K. SMITH
COURT FROM WHICH APPEALED:	JONES COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	LAWRENCE E. ABERNATHY, III SAMUEL STEVEN McHARD LESLIE D. ROUSSELL
ATTORNEYS FOR APPELLEE:	MATTHEW D. MILLER NICHOLAS KANE THOMPSON
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	AFFIRMED - 11/14/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., MAXWELL AND GRIFFIS, JJ.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. The underlying facts are tragic. In 2012, Timothy Hinton was deer hunting when he fell from his tree stand. He was using a fall-arrest system (FAS)—a harness that he wore that was tethered to a strap tied to a tree. But the tree strap snapped. And Timothy plunged eighteen feet, eventually dying from his injuries.

¶2. In 2013, Timothy's parents, Marsha and Thomas Hinton, filed a wrongful-death suit based on Mississippi products-liability law. The defendant manufacturer, C&S Global Imports, Inc., defaulted and is apparently not a source of recovery. So the litigation turned its focus on the manufacturer's insurer, Pekin Insurance Company. After this Court ruled Mississippi had personal jurisdiction over the Illinois-based insurer,[1] Pekin successfully moved for summary judgment based on the clear tree-stand exclusion in C&S Global's policy.[2]

¶3. Retailer Sportsman's Guide, which sold Timothy the tree stand and FAS in 2009, also moved for and was granted summary judgment, giving rise to this appeal.[3] The trial court based its judgment on the innocent-seller provision in the Mississippi Products Liability Act (MPLA). Miss. Code Ann. § 11-1-63(h) (Rev. 2019). The provision states, "[i]t is the intent of this section to immunize innocent sellers who are not actively negligent, but instead

---

[1] ***Pekin Ins. Co. v. Hinton***, 192 So. 3d 966 (Miss. 2016).

[2] We affirmed the grant of summary judgment in ***Hinton v. Pekin Insurance Co.***, 268 So. 3d 543 (Miss. 2019).

[3] The Hintons also sued the Treestand Manufacturer's Association (TMA), a nonprofit that tests and certifies tree stands and FAS, including the FAS Timothy was wearing when he fell. While TMA remains a defendant, the trial court directed the entry of a final judgment as to Sportsman's Guide. *See* Miss. R. Civ. P. 54(b).

are mere conduits of a product." *Id.* And the trial court found no evidence of active negligence by Sportsman's Guide. Instead, the seller was a mere conduit of the tree stand and FAS.

¶4. The Hintons now challenge this ruling. First, they argue innocent-seller immunity is an affirmative defense that Sportsman's Guide waived. But even absent waiver, they argue a material fact dispute exists over whether Sportsman's Guide is an innocent seller. Alternatively, they argue Mississippi's innocent-seller provision should not control. And instead the trial court should have followed Minnesota's approach—the state where Sportsman's Guide is located. Under Minnesota's law, innocent sellers may be liable when manufacturers are judgment proof, like C&S Global is here.

¶5. After review, we affirm the trial court's judgment. First, while the Hintons are correct—the innocent-seller provision appears to be a statutory-immunity provision and thus an affirmative defense—Sportsman's Guide did not waive its right to pursue this defense. Second, there is no record evidence that Sportsman's Guide, based on one of the three statutory exceptions, was not an innocent seller entitled to immunity. Though the Hintons strenuously argue Sportsman's Guide was not an innocent seller because C&S Global was not a "reputable manufacturer," Mississippi's statute does not contain a reputable-manufacturer requirement. Finally, the Hintons' choice-of-law argument lacks merit. In their amended complaints, the Hintons sought to hold Sportsman's Guide liable under Mississippi law. So they cannot now ask the court to change course and ignore controlling Mississippi law—namely, the innocent-seller provision—because Minnesota law is more

favorable to them.

¶6. For better or for worse, Mississippi law is very clear that "innocent sellers who are not actively negligent" cannot be liable "in any action for damages caused by a product." Miss. Code Ann. § 11-1-63(h). That is the law the Legislature enacted. And it is the law that the trial court and this Court must apply. Because our review shows the trial court did not err in holding this provision entitled Sportsman's Guide to summary judgment, we affirm.

Discussion[4]

I. Application of the Innocent-Seller Provision

¶7. Central to this appeal is the trial court's application of the MPLA's innocent-seller provision to hold Sportsman's Guide cannot be liable for selling the allegedly defective FAS. *See* Miss. Code Ann. § 11-1-63(h).

¶8. Adopted in 1993, the MPLA governs "any action for damages caused by a product."[5]

---

[4] The Hintons present their appellate issues as six questions. We discuss question 3 first—is the innocent-seller provision an affirmative defense that Sportsman's Guide waived. Then we condense questions 1, 2, and 6 into one question because they essentially address the same issue—whether the trial court erred by finding no genuine issue of material fact existed regarding the innocent-seller provision. Finally, we address question 5 about whether Mississippi or Minnesota law should apply.

But we do not address question 4—"whether the Court erred in denying Plaintiff's *Res Ipsa Loquitur* claims, as well as Plaintiff's Pattern, Practice, Design and Scheme claims." The Hintons have waived this issue by not arguing in their brief why the trial court erred by dismissing their *res ipsa loquitur* claim. *See* ***Collins v. City of Newton***, 240 So. 3d 1211, 1221 (Miss. 2018). While the Hintons do devote a small section of their brief to their "pattern, practice, design and scheme" claim, they concede that "pattern, practice, design and scheme is more a form of proof tha[n] a count" and that "[t]he allegation is most often used in class actions," which Mississippi does not recognize. So by their own admission, the trial court did not err by dismissing this claim because it is not, in fact, a cognizable claim.

[5] In 2014, the Legislature amended Section 11-1-63 to clarify the MPLA applies to any action for damages caused by a product "including, but not limited to, any action based

Miss. Code Ann. § 11-1-63 (Rev. 2019). Section 11-1-63(a) outlines what a claimant must prove to hold a manufacturer, designer, or seller of a product liable.[6] And subsection (g) entitles a seller or designer to indemnity from the manufacturer of the defective product

---

on a theory of strict liability in tort, negligence or breach of implied warranty." 2014 Miss. Laws ch. 383, § 1 (H.B. 680). Although the Hintons sued the Sportsman's Guide in 2013, the trial court held this amendment applied retroactively to the Hintons' complaint. And the Hintons do not appeal this aspect of the trial court's ruling. But even without the amendment, Mississippi law supports the trial court's application of the innocent-seller provision to all of the Hintons' claims against Sportsman's Guide. *See* ***Holifield v. City Salvage, Inc.***, 230 So. 3d 736, 740 (Miss. Ct. App. 2017) (holding that the innocent-seller provision broadly applied to any products-based actions, including claims for breach of implied warranties).

[6] Under Section 11-1-63(a):

> The manufacturer, designer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller:
>
> (i) 1. The product was defective because it deviated in a material way from the manufacturer's or designer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or
>
> 2. The product was defective because it failed to contain adequate warnings or instructions, or
>
> 3. The product was designed in a defective manner, or
>
> 4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and
>
> (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and
>
> (iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

Miss. Code Ann. § 11-1-63(a) (Rev. 2019).

unless one of three exceptions applied. Miss. Code Ann. § 11-1-63(g)(i) (Rev. 2019).[7]

¶9. In 2004, the Legislature amended the MPLA, adding what is now codified as subsection (h). The language of subsection (h) is very similar to subsection (g) and includes the exact same three exceptions. But instead of providing indemnity to sellers and designers, subsection (h) provides *immunity*, unless one of the three exceptions applies. So now under the MPLA

> the seller of a product other than the manufacturer *shall not be liable unless*
>
> [(1)] the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; or
>
> [(2)] the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or
>
> [(3)] the seller had actual or constructive knowledge of the defective condition of the product at the time he supplied the product.

Miss. Code Ann. § 11-1-63(h) (emphasis added). In adding this provision, the Legislature made its intention clear. It expressly stated in the provision that "[i]t is the intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product." *Id.*; *see also* ***Land v. Agco Corp.***, No. 1:08CV012, 2008 WL 4056224, at *3 (N.D. Miss. 2008) (referring to Section 11-1-63(h) as "innocent seller immunity").

¶10. While many other states have innocent-seller provisions, Mississippi's is one of the

[7] This indemnity provision only applies if the seller or designer gives notice of suit to the manufacturer within ninety days of service of the complaint. Miss. Code Ann. § 11-1-63(g)(ii) (Rev. 2019).

few that protects sellers even when the product's manufacturer cannot be served with process, is insolvent, or is otherwise judgment-proof.[8]

A. Substantive Provision versus Affirmative Defense

¶11. While the innocent-seller provision was adopted fifteen years ago, its application in this case raises an issue of first impression for this Court. Is the innocent-seller provision an affirmative defense, as the Hintons argue on appeal? Or is the innocent-seller provision a substantive provision of the MPLA, as the trial court ruled?[9] Because this issue involves

---

[8] While by no means an exhaustive search, we could find only three other states that provide no exception to innocent-seller immunity based on the plaintiff's inability to sue or enforce a judgment against the manufacturer—(1) Georgia, Ga. Code Ann. § 51-1-11.1; (2) Indiana, Ind. Code § 34-20-2-3; and (3) South Dakota, S.D. Codified Laws § 20-9-9.

The majority of statutory provisions that protect innocent sellers from strict liability contain an exception—they *can* be held strictly liable when the manufacturer cannot be found, served with process, or otherwise held liable. *E.g.,* Ala. Code § 6-5-521; Colo. Rev. Stat. § 13-21-402(2); Idaho Code § 6-1407(4); 735 Ill. Comp. Stat. 5/2-621; Kan. Stat. Ann. § 60-3306(a); Ky. Rev. Stat. Ann. § 411.340; Minn. Stat. § 544.41; Mo. Rev. Stat. §537.762(2); N.C. Gen. Stat. § 99B-2(a); Ohio Rev. Code Ann. § 2307.78(B); Okla. Stat. tit. 76, § 57.2(E)(4)-(6); Tenn. Code Ann. § 29-28-106(4), (5); Wash. Rev. Code § 7.72.040. Notably, Alabama enacted an innocent-seller statute in 2011 that is almost the same as Mississippi's—including a similar statement that the intent of the provision is "to protect distributors who are merely conduits of a product." Ala. Code § 6-5-521(b)(4). But Alabama's version has an exception—a claimant may bring an action against a seller if he "is unable, despite a good faith exercise of due diligence, to identify the manufacturer of an allegedly defective and unreasonably dangerous product[.]" Ala. Code § 6-5-521(c).

Similar to the MPLA *before* the 2004 amendment, several states provide a seller indemnity only. Ariz. Rev. Stat. Ann. § 12-684(A); Ark. Code Ann. § 16-116-207; Fla. Stat. § 686.41. And in at least two states sellers have no right to immunity or indemnity. Instead, their statutes expressly provide that a seller may be held strictly liable for selling a defective product. Or. Rev. Stat. § 30.920; S.C. Code Ann. § 15-73-10.

[9] In their response to Sportsman's Guide motion for summary judgment, the Hintons invoked what they call the "***Horton*** Waiver Doctrine"—the waiver doctrine articulated in ***MS Credit Center, Inc. v. Horton***, 926 So. 2d 167, 180 (Miss. 2006). They argued the Sportsman's Guide waived the affirmative defense of innocent-seller immunity, because it waited too long to file its motion for summary judgment. As discussed in the next

statutory interpretation, it is a question of law, reviewed de novo. ***Wallace v. Town of Raleigh***, 815 So. 2d 1203, 1206 (Miss. 2002). Unlike the trial court, we hold that the innocent-seller provision is an affirmative defense. We base our decision on what the provision is missing and, more important, what the provision includes.

¶12. In contrast to other substantive parts of the MPLA, the innocent-seller provision has no language that explicitly places a burden on the plaintiff to "prove by a preponderance of the evidence." *Compare* Miss. Code Ann. § 11-1-63(h) *with* § 11-1-63(a), (c), and (f) (Rev. 2019). The "notabl[e]" absence of this language has led one Mississippi federal court to conclude the innocent-seller provision is not a substantive requirement of the MPLA but instead an affirmative defense. ***Thomas v. FireRock Prods., LLC***, 40 F. Supp. 3d 783, 792 (N.D. Miss. 2014).[10]

¶13. But more telling than the absent language is the language that is present—namely the statement of intent. By adopting Section 11-1-63(h), the Legislature expressly intended "to immunize innocent sellers who are not actively negligent, but instead are mere conduits of

---

subsection, the trial court dismissed this argument, finding no waiver. But the trial court made an additional ruling, concluding that "in this Court's judgment, the innocent seller provision of the MPLA is a *substantive rule of law* based upon a statute, and not an affirmative defense." (Emphasis added.)

[10] Acknowledging that the Mississippi Supreme Court had yet to rule that the innocent-seller provision is an affirmative defense, the federal court also relied on this Court's statement in ***R.J. Reynolds v. King***, that the MPLA contains a "a series of affirmative defenses, any one of which, if the defendant prevailed upon, could result in success to the defendants, *i.e.*, 'shall not be liable.'" ***FireRock Prods.***, 40 F. Supp. at 792 (quoting ***R.J. Reynolds v. King***, 921 So. 2d 268, 273 (Miss. 2005)). But ***King*** concerned the 2002 version of the MPLA—the version *before* the innocent-seller provision was added. ***King***, 921 So. 2d at 270 (citing Miss. Code Ann. § 11-1-63 (Rev. 2002)). So that opinion cannot be read as having provided guidance on this question.

a product." So Section 11-1-63(h) apparently is a grant of statutory immunity.[11] And, as this Court has recognized in other contexts, statutory immunity is an affirmative defense. *E.g.*, ***Miss. Dep't of Human Servs. v. D.C.***, No. 2018-IA-00592-SCT, 2019 WL 3820779, at *6 (Miss. Aug. 15, 2019) (Mississippi Tort Claims Act immunity); ***Thomas v. Chevron U.S.A., Inc.***, 212 So. 3d 58, 60 (Miss. 2017) (immunity from tort liability under the Mississippi Workers' Compensation Act); ***Dixon v. Singing River Hosp. Sys.***, 632 So. 2d 951, 952 (Miss. 1994) (statutory immunity of community hospitals and boards of trustees); ***Suddith v. Univ. of S. Miss.***, 977 So. 2d 1158, 1168 (Miss. Ct. App. 2007) (federal qualified immunity for state official against § 1983 suits).

¶14. This Court has defined an affirmative defense as one that, "assum[ing] the plaintiff proves everything he alleges and asserts, even so, the defendant wins." ***Hertz Commercial Leasing Div. v. Morrison***, 567 So. 2d 832, 835 (Miss. 1990). That is how Section 11-1-63(h) functions. Even if the plaintiff proves everything under Section 11-1-63(a), the defendant seller still wins by virtue of being a non-manufacturing seller—that is, of course, unless the plaintiff can defeat the seller's immunity by showing one of the three exceptions applies. Miss. Code Ann. § 11-1-63(h). Therefore, the innocent-seller provision is an affirmative defense.

B. *Horton* Waiver Doctrine

[11] Alabama's innocent-seller provision has a similar statement of intent, stating the intent is "to protect distributors who are merely conduits of the product." Ala. Code § 6-5-521(b)(4). But even though it uses the word "protect" versus "immunize," the provision has been described as "immuniz[ing] sellers." ***Barnes v. General Motors, LLC***, No. 2:14–cv–00719–AKK, 2014 WL 2999188, at *5 (N.D. Ala. July 1, 2014).

¶15. Since the innocent-seller provision is an affirmative defense, we next ask if Sportsman's Guide waived it. The trial court answered this question in the negative, and we see no abuse of discretion.

¶16. Sportsman's Guide affirmatively pleaded innocent-seller immunity in its answers to the Hintons' original and amended complaints. Still, the Hintons argue the trial court erred by not applying what they call the "***Horton*** Waiver Doctrine."

¶17. In ***MS Credit Center, Inc. v. Horton***, 926 So. 2d 167, 180 (Miss. 2006), this Court held that "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." The Hintons argue ***Horton*** applies based on the three-and-a-half-year gap between the Sportsman's Guide's being served process and its filing for summary judgment citing the innocent-seller provision.

¶18. But in ***Horton***, this Court found waiver based on "a substantial and unreasonable delay in pursuing the right [to arbitration], coupled with active participation in the litigation process . . . ." ***Id.*** By contrast, the trial court here found Sportsman's Guide's delay "was not 'substantial and unreasonable' given the multiple amended complaints, the multiple interlocutory appeals, and the fact that the vast majority of the litigation process here has been the [Hintons'] efforts to attempt to establish insurance coverage by Pekin Insurance, notwithstanding a policy exclusion for deer stands and related equipment . . . ." This discretionary decision is entitled to deference. ***Jones v. Fluor Daniel Servs. Corp.***, 32 So.

3d 417, 421 (Miss. 2010) (reviewing for abuse of discretion the trial court's decision that no waiver under ***Horton*** occurred).

¶19. First, as the trial court documents in its judgment, the delay was not unreasonable, given the litigation's focus on the insurance-coverage issue coupled with the Hintons' multiple amended complaints. As recently as June 2016—approximately two and a half years after Sportsman's Guide was originally served with process—the Hintons filed a Third Amended Complaint. This latest complaint added new causes of action based on new allegations. Sportsman's Guide filed an answer within a week, reasserting the innocent-seller provision. In August 2016, the parties entered an agreed scheduling order setting the motions deadline for July 1, 2017. And Sportsman's Guide filed its motion for summary judgment on June 8, 2017—within the time limit set by this order and within a year of the Hintons' Third Amended Complaint. *See* ***Mladineo v. Schmidt***, 52 So. 3d 1154, 1161 (Miss. 2010) (affirming the trial court's finding of no waiver in part because "the motion for summary judgment was filed within the time frame established by the parties in their agreed scheduling order").

¶20. Second, the delay was not unreasonable because determining if Sportsman's Guide enjoyed innocent-seller immunity required discovery. This case is very similar to ***Doe v. Rankin County School District***, 189 So. 3d 616, 620 (Miss. 2015). In ***Doe***, the Court held the school district did not waive its sovereign-immunity defense. ***Id.*** "Unlike . . . ***Horton*** . . . , which involved waiver of a defendant's right to compel arbitration and did not require discovery for determining so," this Court found "discovery [in ***Doe*** was] necessary for

determining whether [the school district] enjoy[ed] the right to discretionary-function immunity." ***Id.*** The same is true here. The only examples of Sportsman's Guide's "active participation in the litigation" that the Hintons cite as waiver were its participation in discovery, its responding to the Third Amended Complaint, and its participating in more discovery after the amended complaint.[12] Because immunity under Section 11-1-63(h) is a fact-intensive inquiry requiring discovery, Sportsman's Guide should not be held to have waived this immunity because it waited until discovery was completed to seek summary judgment.

¶21. In ***Doe***, this Court also distinguished the school district's pursuit of its immunity defense from the delay in ***Estate of Grimes ex rel. Grimes v. Warrington***, 982 So. 2d 365 (Miss. 2008). ***Doe***, 189 So. 3d at 620. In ***Grimes***, "the defendant waited five years before asserting a defense of immunity" under this Mississippi Tort Claims Act. ***Doe***, 189 So. 3d at 620 (citing ***Grimes***, 982 So. 2d at 369). And the defendant "offered no explanation as to why he did not move the trial court for summary judgment until five years after the plaintiff's filing of the complaint." ***Id.*** (citing ***Grimes***, 982 So. 2d at 369). Meanwhile, the defendant unnecessarily wasted time by participating in "protracted litigation." ***Id.*** (citing ***Grimes***, 982 So. 2d at 369). But this Court did not find that to be the case in ***Doe***. ***Id.*** And we find no waiver here either. The three-and-a-half-year delay was neither as long as the delay in ***Grimes*** nor without explanation. Further, Sportsman's Guide did not waste time by engaging

[12] The Hintons also point to Sportsman's Guide's removal of this case to federal court. But we fail to see how this was active participation inconsistent with Sportsman's Guide's innocent-seller claim. Further, this case was remanded back to Jones County Circuit Court relatively quickly, just three months after removal.

in protracted litigation. Instead, Sportsman's Guide aimed its litigation efforts at completing discovery. And after discovering there were no genuine issues of material fact regarding its innocent-seller status, it moved for summary judgment.

¶22. For these reasons, we find the trial court did not abuse its discretion by ruling the ***Horton*** Waiver Doctrine did not apply.

II. Grant of Summary Judgment

¶23. We now address the merits of the Hintons' claims against Sportsman's Guide.

¶24. The trial court granted Sportsman's Guide's motion for summary judgment based on the innocent-seller provision. Under Rule 56(c) of the Mississippi Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court reviews the trial court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmovant, in this case the Hintons. ***Hyde v. Martin***, 264 So. 3d 730, 734 (Miss. 2019).

A. No Reputable-Manufacture Requirement

¶25. Under the MPLA, "the seller or designer of a product other than the manufacturer shall not be liable unless" one of three exceptions applies. Miss. Code Ann. § 11-1-63(h). The Hintons argue the trial court erred by finding Sportsman's Guide was undisputedly an innocent seller. But they cannot show one of the statutory exceptions applies. Instead, they ask this Court to go outside the statute's language and craft an additional exception.

According to the Hintons, Sportsman's Guide cannot be an innocent seller because C&S Global was not a "reputable manufacturer."

¶26. C&S Global manufactured the 2009 Hunter Elite tree stand and FAS that Timothy bought under the Hunter's View brand. Hunter's View was a manufacturer that went into bankruptcy shortly before C&S Global was formed in 2008. In 2005, Hunter's View voluntarily recalled five hundred thousand of its 2004 model-year FAS. Hunter's View replaced them with new harnesses. But the replacement FAS also failed additional watchdog testing. And there were indications that the FAS Hunter's View submitted for premarket testing differed from the FAS manufactured and sold. So in 2007, all 2004 and 2005 model-year FAS manufactured by Hunter's View were recalled. As a retailer of Hunter's View products, Sportsman's Guide would have been notified about the recall of the 2004 and 2005 model year FAS. And the record shows Sportsman's Guide notified its customers of the recall.

¶27. The Hintons allege not only that C&S Global was using the Hunter's View brand for its 2009 tree stands and FAS but also that C&S Global was cofounded by the owner of Hunter's View's son-in-law, who once worked for Hunter's View.[13] As the Hintons see it, "C & S Global was just a reboot of Hunter's View; a new company with a new name selling the same Hunter's View designs and products." Moreover, Sportsman's Guide would have been aware of the interrelatedness of the two manufacturers because the retailer's contact

---

[13] The only support in the record about this familial relationship is the assertions by the Hintons' counsel at the summary-judgment hearing. Apparently, counsel was referring to a deposition of the manufacturer's corporate representative that is not a part of this appellate record.

person for C&S Global was the same as its former contact with Hunter's View. So, the Hintons argue, by selling a 2009 model Hunter's View tree stand and FAS, Sportsman's Guide could not have been an innocent seller. That is because C&S Global, as a stand-in for Hunter's View, was not a reputable manufacturer based on the circumstances surrounding the recall of the 2004 and 2005 model-year FAS.

¶28. But the problem with this argument is that there is no "reputable manufacturer" requirement in the innocent-seller provision. Miss. Code Ann. § 11-1-63(h). The Hintons concede this. Still, they ask this Court to look at *the title* of the 2004 bill that amended the MPLA to add the innocent-seller provision.[14] While reviewing an enacting bill's title may be helpful in determining legislative intent when the statute's language is ambiguous, ***Aikerson v. State***, 274 So. 2d 124, 128 (Miss. 1973), *overruled on other grounds by* ***Conley v. State***, 790 So. 2d 773, 796 (Miss. 2001), here, the statute's language is not ambiguous.[15]

¶29. When crafting this statute, the Legislature very clearly stated its intention in the

[14] The bill was described as, among other things, "AN ACT . . . TO AMEND SECTION 11–1–63, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT A PRODUCT SELLER OTHER THAN A MANUFACTURER SHALL NOT BE LIABLE FOR A LATENT DEFECT IF THE SELLER IS A MERE CONDUIT WHO PURCHASED THE PRODUCT FROM A REPUTABLE MANUFACTURER . . . ." 2004 Miss. Laws, 1st exec. sess., ch. 1 (H.B. 13).

[15] That is what distinguishes this case from ***FireRock Products***, which the Hintons cite to support their reputable-manufacturer argument. There, the federal court found the innocent-seller provision *was* ambiguous as to the scope of its application—whether it applied to products-liability theories of recovery only or to any action for damages caused by a product. ***FireRock Prods.***, 40 F. Supp. 3d at 791. Based on this perceived ambiguity, the federal court followed a couple of unpublished district court opinions that had looked to "the title of the enacting language" to determine legislative intent. ***Id.*** But, here, there is no ambiguity.

statute's language. And its express intention was "to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product." Miss. Code Ann. § 11-1-63(h). In situations like this in which "the words of a statute are clear and unambiguous, the Court applies the plain meaning of the statute and refrains from using principles of statutory construction." ***Lawson v. Honeywell Int'l, Inc.***, 75 So. 3d 1024, 1027 (Miss. 2011) (citing ***Clark v. State ex rel. Miss. State Med. Ass'n***, 381 So. 2d 1046, 1048 (Miss. 1980)). And under the statute's plain meaning, there is no reputable-manufacturer requirement. Instead, the statute is clear that to overcome innocent-seller immunity, the seller must have (1) "exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought," (2) "altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought," or (3) "had actual or constructive knowledge of the defective condition of the product at the time he supplied the product." Miss. Code Ann. § 11-1-63(h). Simply put, there is no additional requirement that the product come from a reputable manufacturer. And we refrain from judicially imposing one.

B. No Genuine Issue of Material Fact

¶30. Alternatively, the Hintons seize on C & S Global's connection to Hunter's View and the 2004 and 2005 recalls. They argue these prior events create a genuine issue of material fact about whether Sportsman's Guide had actual or constructive knowledge of the alleged defective condition of the 2009 Hunter Elite tree stand and FAS when it supplied the product

to Timothy in August 2009.

¶31. But the Hintons' evidence is too speculative to create a genuine material fact issue. The actual-or-constructive-knowledge exception requires knowledge of the defective condition "of *the product*." Miss. Code Ann. § 11-1-63(h) (emphasis added). So the inquiry focuses solely on the allegedly defective product that caused the damages. And here the Hintons' evidence about the voluntary recall of Hunter's View 2004 and 2005 model-year FAS is too tenuous to create a material fact issue about whether Sportsman's Guide knew or should have known an FAS manufactured in 2009 by a different, albeit related, manufacturer was defective.[16]

¶32. The Hintons admit the 2009 FAS Timothy wore was not the same as those recalled years earlier. And the Hintons allege the 2009 FAS was certified by codefendant Treestand Manufacture's Association to be safe. The record also shows Scientific Testing Laboratories

---

[16] The same is true of the Hintons' allegations that Sportsman's Guide had sold recalled tree stands before selling Timothy the 2009 FAS and "continued to sell recalled products through the summer of 2013." First, these allegations lack record support. In their brief, the Hintons allude to "[d]ocuments obtained by the plaintiffs [that] conclusively show that The Sportsman's Guide continued to market Hunter's View stands." But they fail to say where in the record these documents were submitted to the court.

Second, liability under the MPLA is based on the particular product alleged to have caused the damages. *See* Miss. Code Ann. § 11-1-63(a). There is no generalized liability for selling an allegedly defective product that has not caused any damages. Similarly, the knowledge-of-the-defective-condition exception is based on knowledge of the product alleged to have caused the damages at the time of sale. Miss. Code Ann. § 11-1-63(h). So unsupported accusations that Sportsman's Guide sold other previously recalled products are not enough in themselves to create a genuine issue of material fact that Sportsman's Guide should have known in August 2009 that the FAS sold with the Hunters Elite stand was defective.

tested the 2009 FAS on May 1, 2009, and found it met all specifications.[17] Importantly, the 2009 FAS has never been recalled.

¶33. Still, the Hintons ask this Court to infer that Sportsman's Guide knew the 2009 FAS was defective. They argue this Court should make this leap because the retailer did not know the 2009 FAS had passed testing when Sportsman's Guide sold the FAS to Timothy in 2009. The Hintons reason as follows: In an interrogatory answer, Sportsman's Guide represented that under its standard practice, when a "manufacturer represents to [Sportsman's Guide] that its product meets the current standard set out by the TMA, [Sportsman's Guide] requests that the manufacturer provide it with a copy of the report for the product prepared by the laboratory conducting the testing . . . ." And in an accompanying request-for-production response, Sportsman's Guide produced a copy of the Scientific Testing Laboratories January 1, 2009 report on the Hunter Elite stand.[18] However, this report specified that no FAS was provided with the tree stand. The 2009 FAS was tested separately on May 1, 2009. But Sportsman's Guide never actually *received* a copy of that report until discovery.

¶34. The Hintons argue this is evidence Sportsman's Guide knew the FAS had *not* been tested but sold it anyway. But not having a copy of the report showing that the FAS had been tested as safe does not mean that it was unsafe, much less that the Sportsman's Guide knew the 2009 FAS was not safe. What is important is that the record shows when the 2009

---

[17] The 2009 FAS had a weight limitation of 350 pounds. Timothy weighed 250 pounds when the accident occurred. According to the user instructions, the harness had to be replaced in five years and the tree strap in one year.

[18] This report was a month before Sportsman's Guide ordered 571 Hunter Elite tree stands from C&S Global to be shipped on May 5, 2009.

Hunter Elite tree stand FAS was sold to Timothy in August 2009, the FAS had passed safety testing and had not been recalled. So there is no genuine issue of material fact that Sportsman's Guide knew or had reason to know of the 2009 FAS's alleged defect.

¶35. Because no exception to innocent-seller immunity applied, Sportsman's Guide was entitled to judgment as a matter of law.

III. Choice of Law

¶36. The Hintons conclude their brief with a lengthy choice-of-law argument. According to the Hintons, under Minnesota law, if a manufacturer is judgment proof, the non-manufacturer seller will be responsible for the judgment, regardless of fault.[19] But this is not the law in Mississippi. Again, the Mississippi Legislature provided no exception to innocent-seller immunity when the claimant cannot sue or enforce a judgment against the manufacturer. Instead, in Mississippi, a seller can be held liable only based on active negligence on its part, either because it exercised control over or altered the product or had actual or constructive knowledge of the product's defective condition at the time of sale. Miss. Code Ann. § 11-1-63(h). Citing choice-of-law principles, the Hintons claim the trial court erred by ignoring Minnesota's strict-liability approach and instead applying Section 11-1-63(h).

¶37. But it is the Hintons who invoked Mississippi substantive law as controlling. The

---

[19] Presumably, the Hintons rely on Minnesota Statute Section 544.41, which allows sellers to be dismissed as strict-liability defendants when they certify to the plaintiff the identity of the manufacturer and when the manufacturer is served with process and files an answer. But this is only a presumption, because the Hintons *fail to cite any Minnesota law* in support of their position.

Hintons amended their complaint three times. And in their last two complaints, the Hintons specifically alleged Sportsman's Guide's actions or inactions violated the "the law of the State of Mississippi." According to the record, it was not until May 30, 2017—three and a half years after the Hintons filed their original complaint and one week before Sportsman's Guide filed its motion for summary judgment—that the Hintons suggested there was a question "whether the products liability substantive law of Mississippi, Minnesota, or Illinois will eventually control the issue of innocent seller." However, if the Hintons really believed Minnesota's law applied and not Mississippi's, they should have advised the trial court much sooner. Instead, they continued to rely on their complaints' allegations that Sportsman's Guide was liable under Mississippi products-liability law. They took this stance right up until the point Sportsman' Guide filed its motion for summary judgment based on Mississippi law. *See* ***Kucel v. Walter E. Heller & Co.***, 813 F.2d 67, 74 (5th Cir. 1987) (finding the appellee had "an obligation to call the applicability of another state's law to the court's attention in time to be properly considered"). Also, judicial estoppel prevents parties from turning about face mid-litigation and arguing a different state's law applies to avoid summary judgment. *See* ***Banes v. Thompson***, 352 So. 2d 812, 815 (Miss. 1977) ("Judicial estoppel normally arises from the taking of a position by a party that is inconsistent with a position previously asserted.").

¶38. Waiver and estoppel aside, we also note the Hintons do not argue Minnesota substantive law governing products liability should apply *in toto*. Instead, it is only Minnesota's approach to innocent sellers that the Hintons want. But choice-of-law

application does not work that way. The Hintons cannot mix and match favorable pieces of two differing states' approaches to products liability to create law that best suits their claims. Instead, as asserted in their Third Amended Complaint, the Hintons have continually sought to recover "under the law of the State of Mississippi." And Mississippi's statutory law is clear that "innocent sellers who are not actively negligent" cannot be liable "in any action for damages caused by a product." Miss. Code Ann. § 11-1-63(h).

¶39. Thus, the trial court did not err when it applied Section 11-1-63(h) and granted Sportsman's Guide's motion for summary judgment.

¶40. **AFFIRMED.**

KING, P.J., COLEMAN, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. RANDOLPH, C.J., AND KITCHENS, P.J., NOT PARTICIPATING.