

FEB 18 2014

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

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BRITTANY F. ROBINSON,  
Plaintiff  
:  
:  
v.  
:  
:  
TRINITY INDUSTRIES, INC, TRINITY  
HIGHWAY PRODUCTS, LLC,  
MAKCO, INC., AND JOHN DOE  
CONTRACTOR  
:

COMPLAINT

COMPLAINT

Comes now the plaintiff, Brittany F. Robinson, by counsel, and moves this Honorable Court for entry of judgment against the defendants, Trinity Industries, Inc., Trinity Highway Products, LLC (collectively "Trinity"), Makco, Inc., and John Doe Contractor on the grounds and in the amount set forth below.

Parties, Jurisdiction and Venue

1. Brittany F. Robinson is an individual and citizen of the United States of America who resides in Corning, NY.
2. Trinity Industries is a Delaware corporation doing business in Virginia, with its principal place of business located at 2525 Stemmons Freeway, Dallas, Texas 75207 and may be served via its registered agent Edward R. Parker at 5511 Staples Mill Road, Richmond, Virginia 23228. Defendant actively solicits business and sells its products in the Commonwealth of Virginia and derives substantial revenue from such sales. The tortious injury giving rise to this suit occurred in the Commonwealth of Virginia and arose from the defendant's contracting and transaction of business in the Commonwealth of Virginia.

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3. Trinity Highway is a limited liability company doing business in Virginia with its principal place of business located at 2525 Stemmons Freeway, Dallas, Texas 75207. Defendant actively solicits business and sells its products in the Commonwealth of Virginia and derives substantial revenue from such sales. The tortious injury giving rise to this suit occurred in the Commonwealth of Virginia and arose from the defendant's contracting and transaction of business in the Commonwealth of Virginia.

4. Makco, Incorporated is a Virginia Corporation with a principal office located at 49 Deerfield Road, Louisa, VA 23093.

5. Defendant John Doe Contractor is reasonably believed to be a contractor in the Commonwealth of Virginia who installed or maintained the guardrail system that is the subject of this lawsuit.

6. This Court has *in personam* jurisdiction over the defendants pursuant to Virginia Code §8.01-328.1(A)(1), (2), (3), (4) and/or (5).

#### **Factual Background**

7. Trinity Industries, Inc. is the parent corporation of Trinity Highway Products, LLC and as such controls Trinity Highway Products, LLC (collectively "Trinity").

8. Trinity is in the business of manufacturing and selling various highway safety and construction products for use across the United States and specifically in and more specifically manufactures and sells the ET-Plus guardrail end terminal ("ET-Plus") under an exclusive licensing agreement from Texas A & M University.

9. The ET-Plus unit is commonly referred to as a "head" and when used in conjunction with the standard "W" style guardrail see throughout the roads and highways of America is designed to safely absorb and dissipate the energy of a vehicular impact.

10. Upon impact, the guardrail is designed to be extruded through the head and flattened out into a ribbon, thus absorbing the majority of the collision energy.

11. The original production of the ET-Plus, built to approved specifications, was overall very successful and not only did it work for an initial impact, it continued, in minimally the majority of instances, to work even when struck again in a separate incident and before maintenance crews were able to repair it.

12. The ET-Plus, along with each and every other product used on the National Highway System throughout the United States must undergo testing to determine and validate crashworthiness before the product may be placed on the National Highway System or on the roads of the Commonwealth of Virginia.

13. The Federal Highway Administration, a division of the United States Government under the U.S. Department of Transportation, along with other state and federal organizations are charged with establishing the crashworthiness criteria for products such as the ET-Plus.

14. Virginia, like other states, requires that its Department of Transportation (“VDOT”) approve any product installed on its roadways. Each highway project in Virginia is governed by contract documents issued by VDOT. These documents require that any products installed on Virginia’s highways be both previously approved by the VDOT and compliant with National Cooperative Highway Research Program Report 350 (“NCHRP 350”), if tested prior to January 1, 2011, or tested using the Manual for Assessing Safety Hardware (“MASH”), if presented for testing after that date. Products previously accepted under NCHRP 350 do not need to be retested unless, of course, the product is changed.

15. NCHRP 350, Recommended Procedures for the Safety Performance Evaluation of Highway Features, establishes a performance range on several criteria that guardrail terminals

must satisfy through as many as seven different tests to be deemed safe and reliable for installation. The prime contractor who submits a winning bid on a project must sign contract documents agreeing with the NCDOT to install only state-approved, NCHRP 350 or MASH-compliant products.

16. Virginia has an Approved List for the product at issue (GR-9 Terminals). Trinity manufactures and sells guardrail end terminals under the names ET-2000 Plus, ET-Plus and ET-31, among others. The ET-Plus, also known as ET-2000 Plus, was approved by VDOT and placed on VDOT's Approved List for End Terminals by 2001. The version of the ET-Plus approved by VDOT remains on VDOT's current Approved Product List. VDOT has not approved any other version of the ET-Plus.

17. Once a product is approved for use along the National Highway System or the roadways of Virginia, its design specifications cannot be altered; or if altered, the product must undergo additional testing and approval prior to its placement on the roadways of Virginia or the National Highway System.

18. Beginning sometime between 2000 and 2005, a different or altered ET-Plus started appearing along the National Highway System and on the roads in the Commonwealth of Virginia, in particular, a revised or altered "head" was manufactured with an exit gap of approximately 1.0 inches rather than approximately 1.5 inches as originally tested, approved, and manufactured.

19. Beginning in early 2005, yet another different or altered ET-Plus started appearing along the National Highway System and on the roads in the Commonwealth of Virginia; in particular, a revised or altered 'head' was manufactured with a 4" feeder chute (as opposed to the prior approved 5" feeder chute) and a shorter overall height.

20. In addition to the above, due to the shortened height, the feeder rails are actually inserted into the head .75" rather than being welded flush to it as originally designed and approved, thus drastically reducing the overall space of the feeder chute.

21. Trinity twice petitioned the Federal Highway Administration ("FHWA") for modifications to other components of the overall ET-Plus system; once in September of 2005 and then again in August of 2007.

22. The above-described requests (September 2005 and August 2007) dealt with components sold with the ET-Plus and their configuration, and nowhere in these design changes does Trinity mention the reduced feeder chute size or any other changes to the ET-Plus head.

23. Based upon information and belief, Trinity never officially notified or petitioned the Federal Highway Administration, the Virginia Department of Transportation or any branch or unit of any federal or state government for approval or consideration of the feeder chute changes as described above.

24. The ET-Plus, as modified in 2005 and at issue in this case, does not allow the guardrail to feed properly through the chute due to the reduced internal area of the head itself causing the guardrail to "throat lock" in the head during impact.

25. Once "throat lock" occurs, as is the case in this action, the ET-Plus system violently stops or redirects the vehicle in a manner causing serious injury or death – often by impalement.

26. Based on information and belief, Trinity, at all times relevant hereto, knew of the dangerous conditions created by its unapproved, modified ET-Plus system, as literally hundreds of thousands of these unapproved, secretly modified, inherently dangerous ET-Plus systems have been in use across the country for several years preceding the incident at issue in this lawsuit.

### Facts

27. Paragraphs 1-26 are incorporated hereby as though fully and completely set forth.

28. At or about 10:50 AM on Monday, February 13, 2013, Brittany Robinson was a passenger in a vehicle travelling northbound on I-81 in Pulaski, VA near mile marker 104.

29. At the time and place described in the preceding paragraph, the vehicle in which Brittany Robinson was a passenger left the roadway and struck an ET-Plus end terminal at issue.

30. The impact described above resulted in the failure of the ET-Plus end terminal to properly extrude and, rather than performing properly, caused the guardrail to lock inside the end terminal and fail to dissipate the energy of the vehicle in a safe manner and bring it to a safe stop.

31. As a result of the ET-Plus failure, the vehicle was impaled by the guardrail and overturned.

32. Further as a result of the ET-Plus failure, Brittany Robinson suffered injuries, including broken bones, which required surgery, hospitalization, and other medical care.

33. In addition to bodily injury, Brittany Robinson suffered emotional distress from her injuries as well from witnessing the injuries to her children, including her child Ethan Robinson who was pinned to the roof of the vehicle by the impaling guardrail and suffered pelvic injuries, brain trauma, and other injuries.

### Count One

#### **(Trinity's Negligence)**

34. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 33, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically again set forth in detail.

35. Defendant Trinity changed, modified and altered their ET-Plus guardrail system, and more specifically, its end terminal which resulted in the guardrail at issue, and guardrails across the United States, failing and, rather than properly absorbing the energy of an impact, it locks up and injures or kills vehicle occupants due to the trauma of the sudden stop, by catapulting the vehicle, redirecting it an unsafe manner, or causing the guardrail to impale the vehicle.

36. Defendant Trinity knew of multiple failures of the secretly modified ET-Plus terminals and failed to disclose either modifications to the products or the dramatic increase in severe, even death-producing collisions occurring across the United States. The terminals were defective in their design and manufacture.

37. As a direct and proximate cause of Defendant Trinity's negligence and gross negligence, Brittany Robinson suffered bodily and other injuries.

### **Count Two**

#### **(Trinity, Makco and John Doe Contractor)**

38. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 37, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically again set forth in detail.

39. Makco, Inc. was responsible for the inspection, maintenance, installation, and/or repair of the guardrail system at issue in this lawsuit.

40. John Doe Contractor was responsible for the installation, maintenance, inspection and/or repair of the guardrail system at issue in this lawsuit.

41. Makco, Inc. failed and was negligent in the inspection, repair, installation, and/or maintenance of the guardrail system at issue in this lawsuit.

42. John Doe Contractor failed and was negligent in the inspection, installation, maintenance, and/or repair of the guardrail system at issue in this lawsuit.

43. The negligence of Makco, Inc. and John Doe Contractor in the performance of their duties, individually and/or collectively was a proximate cause of the injuries to Brittany Robinson.

**Count Three**

**(Strict Liability)**

44. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 43, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically again set forth in detail.

45. Defendant Trinity manufactured and sold the defective ET-Plus that caused Brittany Robinson's injuries.

46. Defendant Makco, Inc. purchased and installed the defective ET-Plus terminal and was compensated for the terminal and installation by VDOT.

47. Defendant John Doe Contractor repaired or replaced the ET-Plus terminal and was compensated for the terminal and/or maintenance by VDOT.

48. Plaintiff alleges that the ET-Plus terminal involved in this cause of action was in a defective and unreasonably dangerous condition at all times herein material, including but not necessarily limited to, the time of design, the time of manufacture, the time of installation, the time of the accident, and the time it was placed into the stream of commerce in Virginia.

49. The design, manufacture, installation, repair, and maintenance of rails placed near vehicles moving at high rates of speed is an inherently dangerous and ultra hazardous activity. As such, all of the defendants are strictly liable in tort.



**Count Four**

**(Implied Warranty of Merchantability)**

50. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 50, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically again set forth in detail.

51. As the manufacturer of the ET-Plus and the vendor of the same, Trinity impliedly warranted to plaintiff that the ET-Plus and all components of and a part of the ET-Plus, as manufactured, equipped and sold by the defendant, including the terminal head, and related parts and components thereof, were free of defects, safe to use, and fit for their intended purposes and uses, were of merchantable quality, and that they, including the material employed in their assembly, were fit, safe and in proper condition for their intended and ordinary uses, and for the particular purposes for which its end users such as plaintiff, intended, and for the general purposes and uses for which they were designed, constructed, assembled, manufactured, tested, inspected, distributed, sold and/or delivered. The use of the ET-Plus which the plaintiff attempted to make on February 13, 2012, was reasonably foreseeable, predictable, and expected/anticipated by the defendant when it sold the ET-Plus.

52. Notwithstanding defendant Trinity's aforesaid implied warranties to plaintiff, defendant breached these warranties by carelessly and negligently:

- a. failing to manufacture the ET-Plus with the dimensions approved by the FHWA and the Commonwealth of Virginia;
- b. failing to test the modified terminal in conformance with NCHRP 350;
- c. failing to conform the ET-Plus to defendant Trinity's implied warranties of merchantability, as they were not, in fact, of merchantable quality and were

unfit, unsafe and dangerous and unusable for their intended uses and purposes and/or reasonably foreseeable uses, or for the general purposes and uses for which they were intended.

**Count Five**

**(Breach of Implied Warranty of Fitness for a Particular Purpose)**

53. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 52, inclusive, of this Complaint with the same force and effect as though they were herein fully and specifically set forth again in detail.

54. Defendant Trinity impliedly warranted that the ET-Plus was fit for the purposes for which it was sold and for the particular purpose of dissipating the forces brought to bear on vehicle occupants in collisions with guardrails. At the ET-Plus from defendant Trinity was sold and installed, Trinity knew or had reason to know that Makco or John Doe Contractor would purchase and install and that the driving public would use the ET-Plus in reliance on the Trinity's skill and judgment to furnish suitable goods.

55. The ET-Plus manufactured, modified, and/or equipped by defendant Trinity, and purchased by Makco or John Doe contractor for the use of the driving public, including the plaintiff, was not fit for the particular purpose for which they were intended. Such conditions of the ET-Plus constituted a breach of the defendant's implied warranties of fitness for a particular purpose.

56. As a direct and proximate result of the defendant's breach, plaintiff was seriously and permanently wronged, injured, and damaged as fully set forth above.

**Count Six**

**(Breach of Express Warranties)**

57. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 57, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically set forth in detail.

58. Defendant made express warranties that the ET-Plus, including, but not limited to, were NCHRP 350 compliant, tested, and approved, free from defects in design and manufacture, and that the ET-Plus had been properly designed, constructed, manufactured, assembled, tested, sold, and distributed; and that the same were safe and could be used and operated by the plaintiff for the uses and purposes normally contemplated; and that Trinity otherwise expressly represented the safety of the ET-Plus, all of which representations and express warranties were reasonably relied upon by Makco or John Doe Contractor, and the driving public, including plaintiff.

59. The ET-Plus as sold by Trinity was not free of defects in material and workmanship; rather, it was defective and not usable for the purposes for which it was sold as aforesaid. Such conditions constituted a breach of Trinity's express warranties, as aforesaid.

60. By reason of the events aforesaid, and as a direct and proximate result of the breach of aforesaid express warranties and representations made by the defendant, plaintiff has been seriously and permanently wronged, damaged and injured as fully set forth above.

**Count Seven**

**(Negligent Infliction of Emotional Distress)**

61. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 60, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically set forth in detail.

62. As a consequence of defendants' negligence and breaches of warranty as described above, plaintiff was forced to watch as her son was violently pinned to the roof of the family's vehicle by the impaling guardrail, causing her to suffer severe emotional distress. Her emotional distress was compounded by the fact that, because of her injuries and the condition of the vehicle after the impact, she was unable to do anything to assist her son and was forced to watch helplessly as her son suffered and cried out for help.

**Count Eight**

**(Punitive Damages)**

63. Plaintiff realleges and repleads all of those allegations contained and set forth in paragraphs numbered 1 through 62, inclusive, of this Complaint, with the same force and effect as though they were herein fully and specifically set forth in detail.

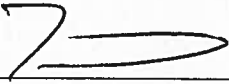
64. The defendants' actions and omissions were willful and wanton and evinced a conscious and reckless disregard for the public in general and your plaintiff in particular. As a consequence, plaintiff is entitled to an award of punitive damages.

WHEREFORE, for Counts One through Seven, plaintiff moves the Court for entry of judgment against the defendants, in the principal amount of \$500,000.00 of compensatory damages and, on Count Eight, \$350,000 in punitive damages, plus interest thereon at the legal

rate from February 13, 2012, until fully paid, plus plaintiff's taxable costs incurred in this action, along with such other and further relief as the Court deems appropriate.

Plaintiff demands a trial by jury on all counts.

Respectfully submitted,  
Brittany F. Robinson

By  \_\_\_\_\_  
Of Counsel

Respectfully submitted this 13<sup>th</sup> Day of February, 2014.

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