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PRELIMINARY STATEMENT

This is an appeal from the denial of a motion for partial summary judgment as to liability only, and to strike defendants’ expert opinion, filed on behalf of plaintiffs, Frank Borowsky, Jr. and his wife, Paulina Borowsky, who sues *per quod* (references to “plaintiff” in its singular form are to Frank¹). Plaintiff slipped from the unprotected metal threshold of the cargo area of a U-Haul truck and smashed his head on the street below, shattering his alveolar bone, resulting in the loss of several teeth, permanent loss of sensation in his upper lip and mouth, and facial disfigurement, among other injuries, leaving him with significant out-of-pocket past, as well as future anticipated, medical and dental expenses.

The threshold of the cargo area of the U-Haul truck was a bare metal edge that had no markings to delineate it. Yet, it also had a slip-resistant grooved aluminum panel that U-Haul designed and installed a few inches into the cargo area, along with a “step bumper” that had raised metal holes below the threshold; U-Haul's own representatives admitted at depositions that both of these features are designed to provide traction. The bare threshold area of U-Haul’s trucks is also in sharp contrast to its competitors’ vehicles, which are designed to include some

¹ Frank and Paulina Borowsky are members of their eponymous law firm, which is serving as their appellate counsel in this matter. Plaintiffs were represented by a different law firm in the trial court proceedings.

form of slip-resistant edges that protect users of their vehicles from slipping and falling.

U-Haul's failure to incorporate any safety feature whatsoever in this area created a risk of significant injury that not only was foreseeable, but was well-known. This defect in U-Haul's trucks is easily and economically remediated, as confirmed not only by the various designs U-Haul's competitors use to protect their customers, but by the anti-slip features U-Haul itself incorporated into its trucks within inches of the threshold from which plaintiff slipped.

The lack of slip resistance along the edge of the exit/entry of U-Haul's vehicles in light of the undisputed foreseeable risk of the significant harm of falling is a clear design defect. U-Haul's expert admitted that no standards governed slip-resistance of its trucks; he conceded the foreseeability of the risk of falling; he did not dispute that falls from the area in question can cause injury; and he did not address the alternative designs presented by plaintiffs and their expert.

The applicable law is clear. A product is defectively designed when it "could have been designed in an alternative manner so as to minimize or eliminate the risk of harm." *Cavanaugh v. Skil Corp.*, 331 N.J.Super. 134, 162 (App.Div.1999), *aff'd.*, 164 N.J. 1 (2000). The undisputed and objective evidence presented on plaintiffs' motion for summary judgment established all of the *prima facie* elements of a design defect product liability claim under this test. Judicially

noticeable government statistics confirmed not only the foreseeability of injury from falls on and from the cargo area of vehicles used for moving goods, but also the magnitude of those risks, rendering surfaces that do not have anti-slip features unsafe. And, both U-Haul's own design features, as well as the designs of U-Haul's competitors' vehicles, established the availability and feasibility of safer alternative designs. In a similar situation, the New Jersey Supreme Court determined that a product lacking available safety features was defectively designed as a matter of law. *Johnson v. Salem Corp.*, 97 N.J. 78 (1984).

Likewise, because there was no evidence that plaintiff knew of and voluntarily encountered the defect, comparative negligence and proximate causation were not available defenses in this product liability claim and should have been stricken on plaintiffs' motion. *Cartel Capital Corp. v. Fierco of New Jersey*, 81 N.J. 548 (1980). The court also erred in declining to strike U-Haul's expert opinion. Accordingly, summary judgment should have been entered as to U-Haul's liability, and the matter tried only as to damages. The orders under review should be reversed and the matter remanded for a damages trial.

PROCEDURAL HISTORY

Plaintiffs filed their complaint on October 6, 2021, alleging product liability and negligence claims against the various U-Haul defendant entities. (Pa1.) The

defendants filed a joint answer on December 7, 2021.² (Pa15.) The plaintiffs filed an amended complaint on August 27, 2024. (Pa31.) The parties subsequently consented to an order that dismissed two of the U-Haul defendants, U-Haul of Arizona and U-Haul of Middletown, based on U-Haul's representation that it would not raise any “empty-chair” defenses as to those parties. (Pa42.)

Following U-Haul's last-minute withdrawal from mediation, plaintiffs moved for partial summary judgment and to strike U-Haul's liability expert, originally returnable on December 20, 2024. (Pa44.). The motion was adjourned and argued on January 3, 2025. On that date, the Law Division judge entered an order denying plaintiffs’ motion. (Pa404.) Following trial before a different judge, an order of dismissal, dated February 14, 2025, was entered, rendering the matter ripe for appellate disposition. (Pa406.) Plaintiffs appeal from these orders. (Pa542.)

² The corporate relationships of the various U-Haul defendants are ambiguous; defendant U-Haul International manufactured the truck body, and the various other U-Haul defendants were responsible for placing it into the stream of commerce and/or maintaining it. Given these defendants’ collective responsibility under product liability law, references to “U-Haul” are to U-Haul International, unless otherwise stated. *N.J.S.A.* 2A:58C-8, defining a “product seller” to include all “involved in placing a product in the line of commerce,” including those who “lease,” “market” and “distribute” products. *See, Cintrone v. Hertz Truck Leasing and Rental Service*, 45 *N.J.* 434, 448 (1965) (strict liability imposed upon truck lessor because the “nature of the u-drive it enterprise is such that a heavy burden of responsibility for the safety of lessees and the public must be imposed on it”).

STATEMENT OF FACTS

The Accident

On August 16, 2020, the plaintiff was assisting his son, Frank Borowsky, III (“Frank”), and Frank’s roommate, Joseph Stockton, who were moving from an apartment in Hoboken. To facilitate the move, Joseph rented a U-Haul truck from defendant U-Haul of New Jersey in Middletown. Joseph drove the U-Haul truck to Hoboken, where he parked it on the street adjacent to the apartment building. Joseph’s brother, Steven, separately drove plaintiff, Frank, and Nathan Tudor, who is now plaintiff’s son-in-law, from plaintiff’s home in Little Silver to Hoboken. It was a cloudy, hot, humid day with intermittent downpours and occasional drizzle. (Pa82-92, T30-11 to -17; T31-1 to 35-12; T38-11 to 39-6.)

As Frank packed up his room, plaintiff and Nathan began moving furniture and other items from the apartment into the truck. The street, sidewalk and other outdoor surfaces were wet from the rain that day. (Pa96-97, T43-9 to 44-12.) Plaintiff and Nathan made between seven and ten trips to the truck, filling approximately one-third of the cargo area. The loading process up to the point of the accident consisted of plaintiff and Nathan or Frank carrying items to the truck, opening the roll-up door, and placing the items onto the bed of the truck. Plaintiff would then step up on the slip-resistant step bumper and into the back of the truck,

where he and Nathan or Frank would move the items toward the front of the truck and stack them as appropriate. (Pa91-92, T38-11 to 39-6.)

On his final trip before sustaining injury, plaintiff and Frank carried a desk to the truck, placed it in the cargo area and moved it toward the front. Frank exited the truck and began walking toward the apartment. (Pa101-103, T48-1 to 50-1.) Plaintiff moved to the back of the truck to exit. As he stepped down from the cargo area onto the step bumper, his “foot slipped off the smooth edge of the” cargo area, causing him to fall face first into the street below. (Pa109-111, T56-22 to 58-21.) Frank heard a “big thud” as he walked back to the apartment, turned around and saw his father motionless in the street, surrounded by blood and teeth. (Pa184-185, T32-11 to 34-15.)

The U-Haul Truck

The U-Haul truck was a 2019 Ford. U-Haul International designed the box-type body, which was manufactured by a subsidiary, and affixed to the chassis of the truck. (Pa208,204, deposition of David Simpson, U-Haul's truck designer, T34-10 to 14; T19-12 to 20-21.) U-Haul denominated the type of truck involved in the accident as a “DC” model. (Pa205, T22-24 to 23-5.) The materials used in the manufacture of the cargo area and the step bumper of the DC trucks did not change in at least the three years prior to the accident; in fact, the design of the truck dated back to the “70s, maybe the 60s.” (Pa208,207, T33-9 to 34-2; T30-18 to -20.)

The floor of the cargo bed sits thirty-three inches from ground level. A galvanized steel step bumper is attached to the truck approximately twenty inches from the ground. (Pa252, photo 7.) That step bumper has a series of raised or “upset” holes that are punched through from the bottom. They are variously referred to as “halos” or “coins,” and are designed to enhance traction for those who use the step bumper to enter and exit the cargo area, as well as to keep water from accumulating on it. It looks like this:



[Pa251, photo 6.]

U-Haul’s representatives admitted that this is a feature designed to increase slip resistance. Simpson, the truck designer confirmed that the purpose of upset holes in the step bumpers was to “offer traction to a step,” and “to give you good traction, get a good firm step.” In addition to assisting with traction and providing

protection against ice buildup, the holes offered relief from water “puddling.” (Pa219, T79-9 to 80-15.) Similarly, Anthony Paladino, who was the president of defendant U-Haul of New Jersey, as well as its designated representative pursuant to R.4:14-2(c), testified that the coins “**are for grip and help people when they’re stepping down,**” and so that water “wouldn’t accumulate and puddle.” (Pa371, 219, T114-24 to 115-8, -16 to -22, T80-9 to -15.)

The edge of the bed sits thirteen inches above the step bumper. The threshold is bare metal – it has no halos, coins, grip tape or other slip-resistant features; nor is it painted a different color to delineate the edge:



[Pa253, p.15, photo 9.]

This unprotected, unmarked edge of the bed is contrasted with a textured metal panel that U-Haul affixed to the interior floor of the cargo area, approximately five inches from the exit threshold:



[Pa251, photo 5.]

U-Haul's designer, Simpson, admitted that this panel also was designed to provide traction for its customers, testifying that those grooves “on the flat surface of the deck . . . **are in that area for footing.**” (Pa218, T67-5 to -6.) Similarly, Paladino, when asked if he knew why this panel was grooved, admitted: “Because if somebody, if somebody is loading the back part, there’s a potential that wind could blow in some water and it’s helping our customers and it helps them to keep their footing,” and that it was “**designed to be slip-resistant.**” (Pa365-366, T108-1

to 109-2.) Behind the textured traction panel, the cargo area reverts to a plain steel flat surface. (Pa253, photo 9.)

U-Haul’s Competitors Design Slip-Resistant Features At The Threshold Of Their Cargo Boxes

In contrast to the unprotected edges in U-Haul-designed trucks, U-Haul's competitors uniformly design slip-resistance into the thresholds of their cargo areas. Penske, Hertz and Budget design in raised circular areas – much like flattened versions of the “coins” that U-Haul trucks have on their step bumpers – into the threshold of their vehicles, while Home Depot affixes slip-resistant tape to the edges of their truck beds to protect their customers:





[Pa254, photo 10.]

U-Haul conceded that those entities are its competitors. (Pa357-358, T100-21 to 101-2.)

Statistics Confirm That The Dangers Associated With Falls From The Cargo Areas Of Vehicles Are A Foreseeable And Universal Hazard, And That They Present The Risk Of Serious Injury.

A study cited by the National Institutes of Health (“NIH”), published in 2003, which was seventeen years prior to plaintiff’s injury, and sixteen years prior to the time the U-Haul truck at issue was placed into the stream of commerce, established that “[f]alls from trucks often result in significant injuries with considerable periods of disability and related costs,” and that “falls from three

specific locations *i.e.* the back of trucks/trailers, the cargo area and the truck step made up 83% of the total falls.” Jones and Switzer-McIntyre, “Falls From Trucks, A Descriptive Study, Based On A Workers Compensation Database,” <https://pubmed.ncbi.nlm.nih.gov/12775923/>. This United States government study is cited in a more comprehensive paper – Scott, Mather and Hallas, “The Underlying Causes of Falls from Vehicles Associated With Slip and Trip Hazards On Steps and Floors,” Health and Safety Executive Research Report 437 (2006). <https://www.hse.gov.uk/research/rrpdf/rr437.pdf> (“the Scott report”).

The Scott report establishes the broad nature of the risk of injury, noting that roughly one-third of all relevant workplace injuries involve falls from vehicles, with a third of them preceded by a slip or trip:

[F]alls from vehicles represent around one third of workplace transport accidents and are spread across a wide range of industries. An analysis of HSE [Health and Safety Executive] accident data for ‘goods type vehicles’ (Walker, 2004) would suggest that at least one third of these accidents are caused by an initial slip or trip. In Walker’s analysis 448 accident reports were examined. At least 124 accidents involved a slip before the fall and 16 involved a trip before the fall. This suggests that at least 31% of falls from vehicles were preceded by a slip or trip (140 accidents). [*Id.* at 1.]

The Scott report further quantifies the significance of the risk of injury, stating that:

Being struck by a moving vehicle **and people falling from a vehicle** are the two most common types of workplace transport accidents **that cause major injuries (e.g., broken bones)** to

employees (HSC, 2003). Over the period 1998/99 to 2002/03, the percentage share of major injuries caused by people falling from a vehicle has increased (from 39% in 1998/99 to 47% in 2002/03) (HSC, 2003). [*Id.* (emphasis supplied).]

The authors also surveyed the universal nature of this hazard:

The wider literature also indicates that falls from workplace vehicles are a pertinent issue. Lin and Cohen (1997) showed from a data analysis of employee injuries/illnesses that ‘slips and falls’ . . . were the most commonly reported accident types for the haulage industry *in the USA*. [*Id.* (emphasis supplied).]

And:

Jones and Switzer-McIntyre (2003) carried out a study based on information from a workers compensation database in Canada. **They showed that the most common site of falls from trucks was the back of the truck** or trailer, the truck step and the cargo being transported (accounting for 83% of total falls). [*Id.*]

The study noted:

Vehicle ingress and egress was cited as one of the four most critical accident problems for the haulage industry. Slips and falls accounted for over 27% of all cases reported which resulted in lost workdays, second highest behind motor vehicle accidents. This study also revealed that *there were three times as many egress accidents* as ingress accidents. [*Id.* (emphasis supplied).]

The authors of the Scott report further confirmed that **“slip potential is significantly increased around the edges of most load areas, where the surface material changes to the smooth steel structure of the vehicle [*just like in the U-Haul truck in this case*]. This smooth threshold is the *critical* area because the**

operator would fall from the vehicle if a slip occurred [*just like what happened to plaintiff*].” *Id.* at 18. This is because such “**smooth surfaces significantly increase the slip potential.**” *Id.* The report establishes that, on some of the tested vehicles “modified surfaces, designed to tackle the issue of pedestrian slips,” such as “[a]nti-slip paints and abrasive tapes have been used to give a high roughness finish to critical areas of vehicles, such as the threshold around the load area.” *Id.* (Emphasis supplied.)

The Expert Opinions

Both plaintiffs’ and U-Haul’s experts recognized that there are no standards that specifically govern slip-resistance of the surfaces of cargo vehicles. (Pa246, 437-439.) Plaintiffs’ expert focused on the risk of harm presented by the U-Haul truck and the plentiful available safer designs. U-Haul’s expert opined, without reference to any applicable standards, that the cargo bed enabled “prudent users” to safely load and unload the vehicle, and focused on plaintiff’s alleged improper conduct.

Plaintiffs’ Expert Report

Plaintiffs’ expert confirmed the foreseeability of the risk of harm from falls such as the one plaintiff experienced, the magnitude of the potential injury from such falls, and the existence of many safer alternative designs. Citing various studies, including the Scott report, she confirmed that slips from the edge of trucks

“result in falls from a greater height, which increases the recognized previously cited risk of injury.” (Pa245.)

Plaintiffs’ expert explained the mechanics of the accident based upon plaintiff’s undisputed testimony, thusly:

The area where Mr. Borowsky slipped is approximately 5 inches wide and runs the length of the rear opening. This area is galvanized steel. Directly adjacent to the area of slippage is a textured aluminum panel, with raised “teeth” that increase friction against common footwear. [Pa251.]

She continued:

Mr. Borowsky was stepping down from the smooth galvanized steel area at the edge of the cargo area, to the step below with raised “coins,” when he slipped. He would have previously stepped in the area of the relatively high traction aluminum panel and would be expecting to move to the relatively high traction step with raised “coins.” Additionally, it is reasonable to expect the threshold of the cargo area to have a slip-resistant treatment, as many competitor vehicles have. [Pa244.]

She further explained:

[U-Haul's] placement of slip-resistant surfaces adjacent to the unprotected subject area instills in users a false sense of confidence in footing while moving through the subject walking area. The slip-resistant surfaces have relief structures that “bite” into footwear and protrude above water accumulation. The user is forced to move from a slip-resistant area to an exposed edge with a lower COF [coefficient of friction]. The Health and Safety Executive has conducted research showing that transitions between high- and low-friction surfaces increase the propensity to slip (Research Report 437, pages viii, 8, and 43). Their research also shows that thresholds of load beds are slip-prone areas that require special attention (pages viii, 18, 23, and 43) and that smooth

metal surfaces present “a significant slip potential when wet” (page 43). Lastly, their research discussed that falling from a vehicle was one of the most common workplace transport injuries (page 1). Despite this published research and competitors’ vehicle designs, UHI [U-Haul International] did not consider the adjacent parts with differing COF to be dangerous (Simpson Deposition, page 73). [Pa245-246.]

In addressing U-Haul's own slip-resistant design features, the plaintiffs’ expert pointed out that “near the edge of the cargo area is a textured panel with raised ‘teeth’ or grooves that would increase friction against common footwear. (Pa 244, 253.) She stated that by “[s]imply extending the grooved aluminum panel all the way to the edge of the cargo area ... is a safer alternative design because the user would never encounter an area with a higher propensity to slip.” (Pa246.)

As to the halos on the U-Haul’s step bumper, she stated that, “[b]elow the cargo area of the subject truck is a galvanized steel step that is integrated with the rear bumper. The step had an arrangement of holes with raised ‘halos’ aka ‘coins’ that would also increase friction against common footwear.” (Pa244.)

In addition to the slip-resistant features used by U-Haul in other areas of its trucks, plaintiffs’ expert also reviewed several of U-Haul's competitors’ trucks. She characterized their uniform use of slip-resistance at the exit thresholds as a “*de facto* industry standard.” (Pa245.) She opined, as to those designs – slip-resistant tape, coining and raised surfaces – thusly:

The Health and Safety Executive specifically recommends use of anti-slip coatings and tape (Research Report 437, page 21),

and its use would eliminate the high- and low-friction transition in the subject design. It is noted that one competitor to U-Haul does use anti-slip tape [Pa247.]

She further found that:

U-Haul’s major competitors—Home Depot, Penske, Budget, and Hertz ...all have anti-slip surfaces in the area of concern, indicating the de facto standard practice in the industry to protect users of the cargo area. **Including coining or anti-skid tape at the edge of the ledge in the U-Haul truck at issue...is an alternative and safer design to the bare metal edge of the U-Haul truck at issue.** [Pa254 (emphasis supplied).]

Based on the foreseeability of risk and the available safer design alternatives, she opined that U-Haul's design was defective “due to the risk of slips and falls,” and that the “risk can be easily mitigated, without affecting the utility of the U-Haul, by extending the textured aluminum panel, using textured friction tape, using surface coatings, or by coining the crossmember.” She also opined that a “slip-resistant coating or tape could have been incorporated into the design to increase friction in the area of concern. Such coatings and tapes are easy to apply and cost effective.” (Pa248.)

Defendants’ Expert Report

U-Haul retained a “human factors” expert to support its defense. That opinion confirmed that various standards governing slip-resistance in different applications did not apply to cargo vehicles, and therefore were not binding on U-Haul. Instead, the defense expert maintained that U-Haul had the unfettered ability

to design the vehicle in any manner it chose. Significantly, U-Haul's expert report did not address at all the safer alternative designs available to, and known by, U-Haul. The report opines, without reference to any facts or applicable standards, that the design “is not unreasonably dangerous” and improperly focuses on plaintiff’s conduct. (Pa447.)

As to standards, U-Haul's expert conceded that “[t]here is currently no mandated number or value for minimum slip-resistance by any state or federal codes” applicable to vehicles. (Pa437.) Thus, according to U-Haul's expert, it was “up to the Authority Having Jurisdiction (AHJ) . . . in this case the U-Haul, to determine what is slip resistant.” (Pa437.) The report also recites multiple “nonmandatory” and “voluntary consensus standards” set forth by various governmental and trade organizations, none of which were binding on, or applicable to, U-Haul. (Pa437-439.)

After citing the various standards that don’t apply to U-Haul, the expert focused on the actions of plaintiff and those over whom he had no control, none of which established a voluntarily exposure to a known defect as required to support a comparative negligence defense in a product liability suit.

U-Haul's expert came to the following four conclusions:

1. The systems safety provided by the U-Haul subject truck design enables prudent users to accomplish loading and unloading in a safe manner and is not unreasonably dangerous.

2. Mr. Borowsky increased his risk of injury because he did not use the available safety features (the handholds, loading ramp) of the truck that would have enabled him to exit from the truck without exposing himself to the risk of overstepping and slipping off the edge of the bed.

3. Parking the truck away from the apartment complex increased the potential of tracking water and outside contaminants onto the truck bed.

4. Loading in the rain increases potential for loss of footing that can be mitigated by using the safety design features such as the handholds and the loading ramp. [Pa447.]

Plaintiffs' Motion For Summary Judgment

Following the conclusion of discovery, plaintiffs moved for summary judgment. In support of their motion, plaintiffs' Statement of Material Facts, submitted pursuant to *R.4:46-2*, set forth eighteen separate paragraphs, generally outlining the accident and setting forth the design features of the U-Haul truck as well as those of its competitors' vehicles regarding slip resistance. (Pa46-51.) Based upon these facts, plaintiffs argued that they were entitled to partial summary judgment as to liability because the undisputed evidence established, as a matter of law, that the U-Haul truck was defectively designed under the safer alternative design defect theory, and that there was no evidence to establish that plaintiff voluntarily and unreasonably encountered the risk presented by the defective product. The plaintiffs also alternatively moved to strike U-Haul's expert report.

In response to plaintiffs’ Statement of Material Facts, U-Haul did not cite to a single document, deposition or interrogatory. (Pa402-403.) U-Haul admitted every one of plaintiffs’ material facts regarding the happening of the accident. In response to plaintiffs’ assertion, in paragraph 11 of their Statement of Material Facts, that “The edge of the bed sits thirteen inches above the step bumper. The threshold is bare metal and lacks holes, coins, grip tape or other slip resistant features,” U-Haul, without citing to anything, issued a bare denial only “as to the term ‘slip resistant feature’.” (Pa403.) In response to plaintiffs’ citation to the obvious slip-resistant features used by U-Haul's competitors to prevent their customers from slipping, U-Haul only stated – again citing no evidence – that the cited photographs of those vehicles “do not prove that the defendants’ competitors’ design slip resistance into the threshold of their cargo areas.” (Pa403.)

At argument, even though both experts conceded that no standard existed that governed the slip-resistance of cargo vehicle surfaces, the court focused on U-Haul's expert overview of the various cited standards instead of his conclusions. This was despite plaintiffs’ counsel’s argument, which pointed out the fact that the majority of U-Haul's expert’s conclusions – 2, 3 and 4 – addressed comparative negligence principles which were inconsistent with the limited type of comparative negligence available in product liability actions, as well as the fact that the expert did not explain his conclusion that the bed of the truck was not defective. (1T24-5

to 25-16). Essentially, rather than determining whether and how the cited standards applied – or not – the court simply concluded that U-Haul's expert's mere citation to standards that he himself conceded to be inapplicable, and the fact that “the defense expert says not defectively designed,” were sufficient bases to overcome plaintiffs’ net opinion argument. This, in turn, created a fact question justifying the denial of plaintiffs’ motion in its entirety. (1T48-16.)

POINT I

THE EVIDENCE BEFORE THE COURT ON THE MOTION BELOW ESTABLISHED DESIGN DEFECT AS A MATTER OF LAW

The Legal Framework

In *Cavanaugh v. Skil Corp.*, 331 N.J.Super. 13, (App.Div.), *aff’d.*, 164 N.J. 1, 4 (1999), both this Court and the Supreme Court formally adopted the safer alternative product design defect theory set forth in the *Restatement (Third) of Torts: Products Liability* §2(b) (1998). In its opinion the appellate panel stated:

To succeed on a claim that a product was defectively designed, “[a] plaintiff must prove either that the product's risks outweighed its utility **or that the product could have been designed in an alternative manner so as to minimize or eliminate the risk of harm.**” [*Id.* at 162 (emphasis supplied, internal quotation omitted).]

In its affirming opinion, which focused on other issues that are not pertinent here, the Supreme Court explicitly confirmed New Jersey’s adoption of the safer

alternative design test “for the reasons expressed in the opinion below.”
Cavanaugh v. Skil Corp., 164 N.J. 1, 4 (2000).

The appellate opinion in *Cavanaugh* differentiated the safer alternative design test from the traditional “risk-utility” analysis, stating that “the crux of plaintiff’s case really was not that ‘the product’s risks outweighed its utility’.” Instead, the court noted that the plaintiff’s theory “was simple: that the [product] ‘could have been designed in an alternative manner so as to minimize or eliminate the risk of harm’.” *Id.* at 162 (emphasis supplied).

The court then went on to concisely summarize the long line of authority confirming New Jersey’s acceptance of the alternative safer design analysis:

This theory is recognized in the *Restatement (Third) of Torts: Products Liability* § 2(b) (1998). We, in turn, recognize this *Restatement* design defect theory. *Green v. General Motors Corp.*, 310 N.J.Super. at 518, 709 A.2d 205; *Fiorino v. Sears Roebuck and Co., Inc.*, 309 N.J.Super. 556, 563, 707 A.2d 1053 (App.Div.1998); *Congiusti v. Ingersoll–Rand Co., Inc.*, 306 N.J.Super. 126, 138–39, 703 A.2d 340 (App.Div.1997) (citing the 1997 Proposed Final Draft Restatement (Third) of Torts: Products Liability of § 2(b)); *Smith v. Keller Ladder Co.*, 275 N.J.Super. 280, 284, 645 A.2d 1269 (App.Div.1994) (citing the Restatement (Third) of Torts § 2(b) (Tent. Draft No. 1 1994)). As stated previously, the Supreme Court of New Jersey recently signalled that it also recognizes this design defect theory. *Lewis v. American Cyanamid Co.*, 155 N.J. at 570, 715 A.2d 967. The Supreme Court appears to have recognized the theory as far back as 1982, albeit in the context of a failure-to-warn case. *Beshada v. Johns–Manville Products Corp.*, 90 N.J. 191, 201 and n. 5, 447 A.2d 539 (1982) (citing *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 238–39 n. 1, 432 A.2d 925 (1981)). [*Cavanaugh*, 331 N.J.Super. at 162.]

Picking up on this theme, the Supreme Court, in its affirming opinion, stated that “the issue upon which most claims will turn is the proof by plaintiff of a ‘reasonable alternative design ... the omission ... [of which] renders the product not reasonably safe’.” *Cavanaugh*, 164 N.J. at 8, quoting, *Green v. General Motors*, 310 N.J.Super. 507 at 518 (App.Div.), certif. denied, 156 N.J. 381 (1998).

The claim in *Cavanaugh*, which involved an injury caused by a defectively designed circular saw, was premised on the saw manufacturer’s failure to incorporate an available safety feature into its product. The accident occurred after the plaintiff, who had been using the saw for over two hours, put the saw down, but did not realize that a guard had not closed. (The manufacturer contended that the guard had improperly been wedged open.) The saw traveled backward after plaintiff put it down, running over his feet and causing him to lose a toe.

Plaintiff’s expert testified that the saw should have been designed with a “blade brake,” even though such devices were not required by the applicable ANSI standard. *Cavanaugh*, 331 N.J.Super. at 147. Such blade brakes had been generally available for at least fifteen years prior to the manufacture of the saw involved in the accident. *Id.* at 149. The court affirmed judgment in favor of the plaintiff.

The application of this test to the undisputed facts of this case required the entry of summary judgment in favor of plaintiffs as to their design defect claim against U-Haul. In their motion, plaintiffs produced unrefuted evidence that the

risk of harm of an unprotected threshold of the U-Haul truck's cargo area was foreseeable; the magnitude and probability of that foreseeable harm; and the existence of safer designs that were in use not only by U-Haul's competitors at their cargo area thresholds, but by U-Haul itself within inches of the thresholds of their trucks.

Johnson v. Salem Corp., 97 N.J. 78 (1984), governed plaintiffs' motion in this regard. In that case, the Supreme Court affirmed the entry of judgment as a matter of law in favor of plaintiff on a design defect claim. There, the plaintiff's hand was crushed by a scrap baling machine, which failed to have an appropriate guard at a "nip point." The claim was the subject of competing engineering experts. Plaintiff's expert testified that a guard preventing users' access to the nip point while the machine was powered on was a reasonably safer design than the existing one. The defense expert conceded that the defendant's product did not contain any feature that would mitigate that foreseeable risk, but maintained that the product was safe. *Id.* at 86-87.

The Supreme Court affirmed the Law Division's and the Appellate Division's determinations that the product was defectively designed as a matter of law. While recognizing that such issues are often jury questions, the Supreme Court stated that "[i]f the minds of reasonable [people] could not differ on

whether” there is a safer alternative design, “*then the court could make the appropriate determination as a matter of law.*” *Id.* at 86 (emphasis supplied).

The Court continued:

Plaintiff's evidence was that nip guarding was known when the machine was manufactured, that the operator would be in a vulnerable position in the normal use of the machine from accidental start-ups, which were foreseeable, and, further, that defendant did nothing to guard against accidental start-ups. By contrast, defendant's expert admitted the foreseeability of accidental start-up and defendants' failure to guard against it. **Accordingly, there was no factual basis to support the expert's conclusion that the machine was reasonably safe.** [*Id.* at 89-90 (emphasis supplied).]

In light of the defendant's expert's failure to adequately rebut the evidence presented regarding a safer design, the Court held that plaintiff's expert had to be credited as a matter of law. It stated that the defense expert's “*factual basis for his rebuttal of plaintiff's expert's safer design alternative did not exist.*” *Id.* at 93 (emphasis supplied). Accordingly, “these factual deficits in defendants' countervailing proofs in juxtaposition with the facts affirmatively established by plaintiff's expert . . . *effectively dissipated any genuine outstanding differences as to the ultimate factual conclusions to be reached.*” *Id.* at 94 (emphasis supplied). The Court held that “defendants' evidence concerning the presence of a design defect did not rebut that of plaintiff and did not fairly pose a factual dispute required to be resolved by the jury.” *Id.* at 90 (emphasis supplied.)

Similarly, in *Mettinger v. W.W. Lowensten, Inc.*, 292 N.J.Super. 293, 309-11(App.Div.1996), *aff'd sub nom, Mettinger v. Globe Slicing Mach. Co.*, 153 N.J. 371 (1998), the court confirmed the propriety of a directed verdict in favor of plaintiff in a design defect case where the manufacturer did not adopt an available safer design for its product.

In that case, the court affirmed judgment in favor of a plaintiff who cut his hand on a meat slicing machine after he reached out to stabilize himself as he slipped and lost his balance, coming in contact with the rotating blade of the machine. The plaintiff sued the machine manufacturer and distributor alleging failure to warn and design defect claims. As to the design claim, plaintiff submitted evidence that his injury was “objectively foreseeable,” and could have been prevented, or its severity diminished, if the machine was designed with a blade interlock. *Id.* at 308, 310.

Based upon the evidence before it, the panel found that “it was indisputable that in 1980, when the slicer in question was produced, it could readily have been manufactured with an interlock.” *Id.* at 306. The evidence further indicated that, when the machine was manufactured in 1980, similar machines did not use interlocks, but in 1984, before plaintiff’s accident, the manufacturer introduced a new model with an interlock. *Id.*

The plaintiff's expert opined that the product could have been made safer because "the danger could have been obviated or greatly reduced by designing the slicer with an interlock." *Id.* at 310. The defense expert, like U-Haul's expert in this case, did not counter the plaintiff's opinion as to this safer alternative design. The court held that "*a reasonable jury could not rationally have reached any conclusion other than that, because of the omission of a blade interlock, the [product] was defectively designed.*" *Id.* (emphasis supplied).

The court also rejected the manufacturer's argument "that there was a jury question whether its food slicer was defectively designed because no other manufacturer had incorporated a blade guard interlock into the design of its machines until 1984, after the slicer in question was sold." *Id.* at 311. In rejecting that argument, the court held that "if there is an available, effective and inexpensive safety device which would reduce or eliminate a danger otherwise posed by a product," then "the failure of all the manufacturers in an industry to introduce the device does not prevent their products from being defective and does not immunize any of them from liability." *Id.* at 311.

The court went on to apply this concept to impose liability on the distributor of the food slicer as well as the manufacturer: "That everyone else's slicer was also defectively designed would be immaterial to the liability of the manufacturer of the ... food slicer and it is therefore also immaterial to the liability of its distributor."

Id. (Here, the converse situation is presented – everybody but U-Haul used inexpensive safety devices that would reduce or eliminate the danger confronted by plaintiff – further establishing that the U-Haul design is defective as a matter of law.)

Johnson and Mettinger stand for the simple proposition that when evidence of a safer alternative design is presented that would diminish or obviate the risk of a foreseeable significant harm, and like here, the defendant does not rebut the availability of that safer design, then the product is defective as a matter of law.³

³ The inquiry governing the analysis of this case which involves the summary judgment rule, R.4:46–2, and the cited cases, which involved directed verdicts, R.4:37–2(b), R.4:40–1, and judgments notwithstanding the verdict, R.4:40–2, is identical and simply involves a matter of perspective:

“The only distinction between [these Rules] is that summary judgment motions are generally decided on documentary-evidential materials, while the directed verdicts are based on evidence presented during a trial,” and **“the essence of [‘]the inquiry [in] each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”** *Tomeo v. Thomas Whitesell Const. Co.*, 176 N.J. 366, 369–70 (2003) (internal quotations and citations omitted, emphasis supplied). *Cf. Berkoski v. Honda Motor Co., Ltd.*, 480 N.J.Super. 379 (App.Div.2025) (applying summary judgment model to design defect claim).

Here, U-Haul did not dispute the documentary and testimonial evidence cited by plaintiffs as to the happening of the accident or the safer alternative designs, rendering disposition under the summary judgment model appropriate. In fact, U-Haul admitted virtually all of plaintiffs’ statements of fact, except for the safety of its competitors’ designs, which not only is self-evident and not subject to dispute, but was uncontested with contradictory factual support. *Sullivan v. Port Authority of New York and New Jersey*, 449 N.J.Super. 276, 279 (App.Div.2017) (“reliance

The Undisputed Facts Required The Entry Of Judgment In Favor Of Plaintiffs As To Their Design Defect Claim. (See, 1T33-34.)

In this case, plaintiffs established “safer alternative designs” based on both reference to U-Haul's own design features, as well as through their expert report.

U-Haul's Own Design and Its Agents' Testimony Confirmed The Availability Of Safer Designs Even Without The Benefit Of Expert Testimony

First, U-Haul's own trucks confirmed, independent of any expert opinion, the existence of safer alternative designs that it could have employed in the area where plaintiff fell, which would have reduced the risk of slipping. One of the “steps” provided to users to climb into and out of the cargo area of the truck – the step bumper – included raised circular holes or “coins” punched up through the steel bumper, which U-Haul's corporate representatives confirmed were designed to limit the risk of slips and to mitigate the effect of water accumulation.

This slip-resistant step contrasted with the bare metal nosing of the second “step” – the edge at the threshold of the cargo area – which did not have any slip resistant feature such as coining, grooves, or dimpling or slip-resistant tape.

Then, five-inches into the cargo area from the edge of the bed, U-Haul designed and inserted an extruded aluminum panel that it secured to the steel floor of the cargo area. That panel was textured with “teeth” or “grooves,” specifically to

on bare conclusions . . . was insufficient to defeat” summary judgment), *certif. denied*, 232 N.J. 282 (2018).

provide traction and diminish the risk of slips, or, as U-Haul put it, to provide “footing.” (Plaintiffs’ expert confirmed that simply “[e]xtending the textured aluminum panel to the edge of the cargo area would be a simple and cost-effective alternative safer design.” (Pa246.)) Like the experts in *Johnson* and *Mettinger*, U-Haul's expert did not dispute this fact – nor could he.

Thus, U-Haul designed the vehicle so that it omitted safety features – which it incorporated elsewhere on the same vehicle – in the very area of the vehicle that was most likely to result in serious injury from a fall while exiting the truck: the rear of the cargo area to the ground below.

The existence of safer alternative designs is conclusively – and objectively – established not only by U-Haul's own use of anti-slip material in adjacent areas of the same truck, but by its competitors’ widespread employment of threshold slip-protection to prevent injury to their customers. Home Depot, Budget, Penske, and Hertz all use some form of slip-resistant material on exit thresholds of their vehicles. The various designs employed by these entities – slip-resistant tape, studded surfaces and upset, but tapered, holes at the edges – are safer designs that protect against slips and falls. No reasonable person could conclude that such surfaces are not more slip-resistant than the smooth, bare edge of the U-Haul truck. In fact, it is common knowledge that “anti-skid” tape and textured surfaces are

inherently slip-resistant and more likely to prevent people from slipping than a surface that is bare metal.

Neither U-Haul's expert report, nor anything submitted on the motion below, even attempted to refute the availability of these alternative competitor designs, or that they were safer than U-Haul's bare metal edge. U-Haul's failure to properly counter these undisputed facts in its opposition to plaintiffs' motion required the court to enter summary judgment in favor of plaintiffs' as to design defect under *Johnson and Mettinger*.

Plaintiffs' Expert's Opinion Also Confirmed The Existence Of Several Safer Alternative Designs For The U-Haul Truck.

Plaintiffs' expert confirmed the enhanced slip resistance of U-Haul's own safer alternative designs in areas adjacent to the edge, as well as the protective features used by U-Haul's competitors. Despite the fact that plaintiffs' expert based her opinion on these features, U-Haul's expert report, which was prepared after plaintiffs' report was served on U-Haul, did not even mention the words "Home Depot," "Penske", "Budget", "Hertz", "groove", "coin," "halo" or even "tape." He only mentions the word "competitors" once, and not to address their alternative designs.⁴ The failure to address these safer alternative designs proffered by

⁴ The only reference to the word "competitor" in U-Haul's expert report is to mention plaintiffs' expert's reference to the "*de facto* industry standard" established by U-Haul's competitors for slip-resistant edging at cargo thresholds. (Pa445.)

plaintiffs confirmed that *Salem* and *Mettinger* required the entry of summary judgment in favor of plaintiffs, and, that, under *Salem*, 97 N.J. at 86, 90, 94, plaintiffs' expert should have been credited as a matter of law.

In fact, this case presented an even stronger case for imposing liability as a matter of law than *Salem* and *Mettinger* did. Those cases involved complicated machinery and guards, while this case involved a much simpler question, the answer to which should have been self-evident on the evidence provided on the summary judgment motion, *i.e.*, that some form of readily available slip-resistant surface is a safer alternative to no such protective measures. U-Haul's failure to do anything required the Law Division to enter summary judgment against it.

Cited Studies Irrefutably Confirmed The Foreseeability Of Harm And The Magnitude Of That Harm, Establishing That The U-Haul Truck Was Unsafe.
(*See*, 1T26-27)

In *Grzanka v. Pfeiffer*, 301 N.J.Super. 564 (App.Div.1997), *certif. denied*, 154 N.J. 607 (1998), the court noted that, under the safer alternative design test, in addition to coming forward with a safer alternative design to protect against the risk of harm, “there is a second aspect to the ‘reasonable alternative design’ test,” *i.e.*, the existence of “a reasonably foreseeable risk,” establishing that “‘the omission of the alternative design renders the product not reasonably safe’.” *Id.* at 579. (Internal citation omitted). Such proof can be presented by expert testimony

or otherwise. *Id.* Here plaintiffs’ presented such evidence by way of an expert report that cited independently judicially noticeable studies that confirmed the foreseeability of the risk of falls, especially from the edges of cargo areas, as well as the magnitude of that risk. None of this was rebutted on plaintiffs’ motion for summary judgment by expert opinion or otherwise.

The multiple cited reports issued by several governmental entities irrefutably established the foreseeable and significant risk of harm presented by the threshold of U-Haul's cargo box.⁵ These studies confirmed the foreseeability of “serious injuries from falls from a wide cross section of workplace vehicles,” including delivery vehicles, a category into which the U-Haul truck in this case – and U-Haul trucks in general – plainly falls. These comprehensive reports evidenced the universal hazards associated with falling in and from vehicles based on studies from the United States, the United Kingdom, Canada, and Australia. Scott Report at 1. (The statistics are uniform in the cited jurisdictions, and confirm that “[i]n

⁵ The Health and Safety Executive and other cited studies are judicially noticeable under *N.J.R.E.* 201(b)(3) (“Facts which may be judicially noticed include ... specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned.”). *See, J.S. v. R.T.H.*, 155 *N.J.* 330, 341 (1998) (relying on U.S. Department of Justice statistics as “empirical support for the conclusion that sexual abuse of a child ... is a risk that can be foreseen by a spouse”); *Lindquist v. City of Jersey City Fire Dep't*, 175 *N.J.* 244, 273 (2003); *Planned Parenthood of Cent. N.J. v. Farmer*, 165 *N.J.* 609, 640 (2000); *State v. Terry*, 430 *N.J. Super.* 587, 594 *n.5* (App. Div. 2013), *aff'd*, 218 *N.J.* 224 (2014); *J.H. v. R&M Tagliareni, LLC*, 239 *N.J.* 198, 226 (2019).

combination, these data sources suggest that slip and falls from and around” such vehicles “are a problem.” *Id.* Significantly, metal surfaces are the slipperiest of cargo bed materials “in terms of typical slip resistance values with water contaminants” *Id.* at 17, and “slip potential is significantly increased around the edges of most load areas, where the surface material changes to the smooth steel structure of the vehicle,” because “the operator would fall from the vehicle if a slip occurred” – like what happened here. *Id.* at p.18. Suggested remedies specifically include “anti-slip coatings” such as “gritted paints and anti-slip tape.” *Id.* at p.21. (U-Haul concedes that its cargo areas are not waterproof, that the edge of the bed is exposed to the elements, and that “people of all walks of life fall and get injured.” (Pa346-347, 434.))

Thus, as a matter of law, plaintiffs also established the second element of the reasonable safer design test – that U-Haul's failure to design slip-resistant features into the edge of the truck rendered its products not reasonably safe.

In sum, even without reference to expert opinion, plaintiffs factually established safer alternative designs by virtue of U-Haul's own truck designs, which incorporated concededly slip-resistant features within inches of the “critical” area where plaintiff fell. These obvious safer alternatives were confirmed by unrefuted expert opinion regarding safer alternative designs used by U-Haul and its

competitors. Plaintiffs also presented evidence of the foreseeable risk of significant harm created by U-Haul's omission of these features.

None of this evidence was even mentioned by U-Haul's expert, much less refuted by U-Haul on summary judgment. This required the entry of summary judgment in favor of plaintiffs on their design defect claim. *Johnson, supra; Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995) (affirming the entry of summary judgment in favor of a plaintiff, ruling that an insurance broker acted negligently as a matter of law).

The Law Division erred in denying plaintiffs' motion as to liability, and the orders under review should be reversed.

POINT II

THE COURT ERRED IN DECLINING TO STRIKE U-HAUL'S COMPARATIVE NEGLIGENCE AND PROXIMATE CAUSATION DEFENSES (*See*, 1T28-29.)

In the motion below, plaintiffs also sought to strike U-Haul's comparative negligence and proximate causation defenses. Even though U-Haul did not present a single fact indicating that plaintiff knowingly and voluntarily encountered the defective condition of the U-Haul truck as required by New Jersey law, and even though the motion judge conceded in his ruling that the "underlying material facts are not in dispute," (1T50-1 to -2), the court improperly denied this aspect of plaintiffs' application.

It has been settled in New Jersey for over fifty years that “[p]laintiff’s fault is a defense” in a product liability suit **only** when the defendant “show[s] that the plaintiff with actual knowledge of the danger posed by the defective product voluntarily and unreasonably encountered that risk.” *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 562–63 (1980). This “requires a ‘specific awareness of the dangerous defect which actually causes the accident and not simply knowledge by the product user that he has entered a zone of potential danger’.” *Lewis v. American Cyanamid Co.*, 294 N.J. Super. 53, 79 (App. Div. 1996), *aff’d as modified*, 155 N.J. 544, (1998) (internal citation omitted). *See also*, *Crumb v. Black & Decker (U.S., Inc.)*, 204 N.J. Super. 521, 530, (App. Div. 1985), *appeal dismissed*, 104 N.J. 432 (1986) (plaintiff sitting cross-legged on the ground while he used defendant’s saw was not a defense to a claim that the saw’s protective guard had been defectively designed). The purpose of this rule is simple: “The manufacturer’s duty is imposed precisely to avert foreseeable inadvertent injury to a user of a product.” *Lewis*, 294 N.J. Super. at 75, *quoting*, *Cepeda v. Cumberland Engineering Company, Inc.*, 76 N.J. 152, 186 (1978).

It is error to allow a jury to consider comparative negligence when the evidence does not support that defense. “A jury may consider a plaintiff’s negligence only when the evidence adduced at trial suggests that the plaintiff was somehow negligent and that negligence contributed to the plaintiff’s damages.”

Roman ex rel. Roman v. Mitchell, 82 N.J. 336, 343, (1980); *Massotto v. Pub. Serv. Coordinated Transp.*, 71 N.J.Super. 39, 45, (App.Div.1961) (holding that “[w]hen the evidence discloses that the plaintiff was not guilty of any negligence which contributed to the happening, it is improper and unwarranted to submit the issue of contributory negligence to the jury”). See also, *Fernandes v. DAR Develop. Corp.*, 222 N.J. 390, 412 (2015); *Cavanaugh*, 331 N.J.Super. at 190 (upholding court’s refusal to allow product liability defendant to argue comparative negligence).

In this case, the plaintiff’s undisputed deposition testimony, which was before the court below in its entirety, did not even remotely suggest that he was aware of the risk presented by the smooth edge of the U-Haul bed or that he knowingly encountered it. In fact, U-Haul did not take exception to the plaintiffs’ statement of facts as to the happening of the accident, nor did it present any testimony by anyone to support a comparative negligence defense.⁶ Thus, this issue was ripe for disposition in plaintiffs’ favor by the motion court. *Cartel*, 81 N.J. at 563 (“[W]e find *as a matter of law* that there was not an unreasonable and voluntary exposure to a known risk. There was no evidence of plaintiff’s voluntary exposure to a known danger.”)

⁶ In fact, this issue went unaddressed in U-Haul’s brief, constituting a waiver of opposition to that aspect of plaintiffs’ motion below. *Liebling v. Garden State Indem.*, 337 N.J.Super. 447, 465–66 (App.Div.), *certif. denied*, 169 N.J. 606 (2001) (“An issue not briefed is deemed waived.”).

In *Cartel*, the Court also determined that the alleged comparatively negligent conduct alleged by defendants could not “be deemed, as a matter of law, to be a proximate cause of the damages.” So too is the case here, which required the entry of summary judgment in favor of plaintiffs on their product liability claim. Again, this argument was not factually refuted or even addressed below by U-Haul, resulting in a waiver of opposition.

The failure of the motion judge to strike U-Haul's comparative negligence and proximate cause defenses afforded U-Haul's counsel the opportunity to improperly present a theme of plaintiff's “personal responsibility” at trial. This error clearly had the capacity to improperly affect the jury's determination as to product defect, and was “clearly capable of producing an unjust result,” requiring reversal of the judgment entered in favor of U-Haul. *Ahn v. Kim*, 145 N.J. 423, 434 (1996).

POINT III

THE LAW DIVISION ERRED IN ITS REFUSAL TO STRIKE U-HAUL'S EXPERT REPORT (See, 1T20.)

Separate and apart from their motion for partial summary judgment, plaintiffs simultaneously moved to strike U-Haul's expert opinion in accordance with *Cho v. Trinitas Medical Ctr.*, 443 N.J.Super. 461, 470-71 (App.Div.2015) (rejecting consideration of *in limine* motion to bar expert opinion where granting of motion would have dispositive impact on case), *certif. denied*, 238 N.J. 485 (2019).

This aspect of plaintiffs’ motion, as articulated more fully below, had several components. U-Haul’s expert’s first conclusion as to product safety improperly reflected the expert’s personal opinion, which was untethered to any standard. It also parroted an element of the inapplicable risk-utility analysis, which did not apply to the safer alternative design theory under which plaintiffs pursued their claim. The remaining conclusions – 2, 3 and 4 – rendered opinions as to plaintiffs’ specific alleged conduct, which was irrelevant in this product liability claim.

The Legal Principles

N.J.R.E. 702 and 703 govern expert testimony. New Jersey courts have “declined to admit expert opinion without a proper factual foundation.” *Vuocolo v. Diamond Shamrock Chem.*, 240 *N.J. Super.* 289, 300 (App. Div. 1990). Specifically, “[t]his prohibition against speculative expert opinion has been labeled by modern courts as the ‘net opinion rule.’” *Id.* Essentially, “an expert must ‘give the why and wherefore’ of his or her opinion, rather than a mere conclusion.” *Creanga v. Jardal*, 185 *N.J.* 345, 360-62 (2005) (quoting, *Rosenberg v. Tavorath*, 352 *N.J. Super.* 385 (App. Div. 2002)). The net opinion rule is a “corollary of [*N.J.R.E.* 703] ... which forbids the admission into evidence of an expert’s conclusions that are not supported by factual evidence or other data.” *Townsend v. Pierre*, 221 *N.J.* 36, 53–54 (2015).

In *Townsend*, 221 N.J. at 55, the Court explained the net opinion rule, noting that the *Rules of Evidence*:

Mandate that experts “be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.” *Landrigan, supra*, 127 N.J. at 417, 605 A.2d 1079. An expert's conclusion “ ‘is excluded if it is based merely on unfounded speculation and unquantified possibilities.’ ” *Grzanka v. Pfeifer*, 301 N.J.Super. 563, 580, 694 A.2d 295 (App.Div.1997) (quoting *Vuocolo v. Diamond Shamrock Chem. Co.*, 240 N.J.Super. 289, 300, 573 A.2d 196 (App.Div.), *certif. denied*, 122 N.J. 333, 585 A.2d 349 (1990)), *certif. denied*, 154 N.J. 607, 713 A.2d 498 (1998). As the Appellate Division noted, **when an expert speculates, “he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror.”** *Jimenez v. GNOC, Corp.*, 286 N.J.Super. 533, 540, 670 A.2d 24 (App.Div.), *certif. denied*, 145 N.J. 374, 678 A.2d 714 (1996), *overruled on other grounds, Jerista v. Murray*, 185 N.J. 175, 883 A.2d 350 (2005). By definition, unsubstantiated expert testimony cannot provide to the factfinder the benefit that N.J.R.E. 702 envisions: a qualified specialist's reliable analysis of an issue “beyond the ken of the average juror.” *Polzo, supra*, 196 N.J. at 582, 960 A.2d 375 (citations omitted); *see N.J.R.E. 702*. Given the weight that a jury may accord to expert testimony, **a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record.** [*Id.* at 55 (emphasis supplied).]

Similarly, a “standard that is personal to the witness is equivalent to net opinion.” *Crespo v. McCartin*, 244 N.J. Super. 413, 422–23 (App. Div. 1990), *citing, Fernandez v. Baruch*, 52 N.J. 127 (1968); *Carbone v. Warburton*, 11 N.J. 418 (1953), *Parker v. Goldstein*, 78 N.J. Super. 472 (App. Div.), *certif. den.*, 40

N.J. 225 (1963). “Such an opinion provides no assistance to the trier of fact as contemplated by” the evidence rule. *Id.*

In *Townsend*, 221 *N.J.* at 61, the Court confirmed that an expert’s net opinion cannot be used to defeat a summary judgment motion. Similarly, in *Davis v. Brickman Landscaping, Ltd.*, 219 *N.J.* 395 (2014), the Court reinstated summary judgment after rejecting a fire code expert’s opinion, which relied on concededly inapplicable standards, like U-Haul’s expert did in this case. The Court held that the opinion could not be considered as a viable basis for opposing a summary judgment motion, stating that “the standard of care [the expert] set forth represented only his personal view and was not founded upon any objective support. His opinion as to the applicable standard of care thus constituted an inadmissible net opinion.” This resulted in the Court reinstating a prior grant of summary judgment that had been reversed by the Appellate Division. *Id.* at 401.

U-Haul’s Liability Expert Opinion Should Have Been Stricken

Each of U-Haul’s expert’s conclusions should have been deemed inadmissible because they either could not assist the trier of fact, were not beyond the “ken” of an ordinary layman, and/or were a net opinion. They are addressed *seriatim*.

First, the opinion referenced in conclusion number 1 – that “[t]he systems safety provided by the U-Haul subject truck design enables prudent users to

accomplish loading and unloading in a safe manner and is not unreasonably dangerous” (Pa447) – was inadmissible and irrelevant to the “alternative safer design” test at issue in this case.

Under the test adopted by the court in *Cavanaugh*, 331 *N.J.Super.* at 162, it is plain that the U-Haul truck “could have been designed in an alternative manner so as to minimize or eliminate the risk of harm.” Therefore, opinion 1 was legally irrelevant, and unable to assist the trier of fact. Instead, that opinion appears to relate to element 5 of the “risk-utility analysis,” which is inapplicable to this case.⁷

Additionally, opinion 1 is not based on anything. It provides no analysis of any of the concededly non-mandatory and inapplicable standards to which the expert refers, rendering them irrelevant and unable to support conclusion number 1.

Further, the fact that certain analogous standards may not be mandatory does nothing to support the expert’s contention that the “truck was safe for its intended purpose,” especially in the absence of any opinion as to design alternatives.⁸

⁷ As noted, the safer alternative design test set forth in *Cavanaugh, supra*, supplanted the “risk-utility” analysis as set forth in *Cepeda v. Cumberland Mfr. Group Inc., supra*, 78 *N.J.* 153, 173-74. That test consisted of seven elements, including “(5) The user’s ability to avoid danger by the exercise of care in the use of the product.”

⁸ Regardless of U-Haul's expert’s personal statement, sellers and manufacturers have a duty to either make a product safe for use or adequately warn of inherent danger *regardless of whether industry safety standards exist. Freund v. Cellofilm Props., Inc.*, 87 *N.J.* 229, 242–43, (1981). Thus, the absence of such standards does

Nothing in this conclusion, or the expert’s report, addressed this issue. In the absence of such an analysis, this conclusion was nothing more than the expert’s “personal opinion,” rendering it inadmissible. (In fact, this opinion supports the converse proposition – mere compatibility with some minimum inapplicable standard in the face of safer alternatives establishes defect rather than obviates it.) The motion judge erred in declining to provide analysis as to this issue.

Finally, opinion 1’s reference to “prudent users” was inappropriate because that statement was inextricably tied to conclusions 2 through 5, which rendered opinions as to plaintiff’s actual conduct, rather than to a “hypothetical average user,” as required for addressing element 5 of the risk-utility analysis. *Johansen v. Mikita, USA*, 128 N.J. 86, 101 (1992).

Johnson v. Salem Corp., supra, 97 N.J. at 86, 91, confirms the validity of plaintiffs’ position. There, the Court addressed a product manufacturer’s expert’s opinion that “[i]n relationship to the function for which the machine was designed or what it was designed to accomplish, it is a safe machine.” The Court held that this conclusion “was infirm in both its factual foundation and inherent reasoning.

[The expert’s] expressed belief that the scrap baling machine was reasonably safe

not exempt entities in unregulated industries from liability for harm caused by their defective products. *See, Mettinger v. W.W. Lowenstein, Inc., supra*, 292 N.J. Super. at 311. Indeed, holding manufacturers strictly liable for harm caused by defective products often motivates the development of industry-wide standards. *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 398 (1982).

was not adequately supported by sufficient underlying facts. It amounted to no more than an inadmissible ‘net opinion’.” *See also, Cavanaugh*, 331 *N.J.Super.* at 147 (affirming judgment in favor of plaintiff even though the product complied with the applicable ANSI standard, and other manufacturers sold similar products, which also lacked the safety feature in question, because alternative designs were available, but not required.)

As noted previously, *Johnson* and *Mettinger* both require defense experts to specifically address safer alternative designs presented by the plaintiffs. Here, U-Haul's expert did nothing of the sort. He argued that U-Haul is untethered to any standard in the design of its cargo trucks, he cut from whole cloth a bare minimum number to apply to U-Haul, and, most importantly, declined to address the safer alternative designs presented by plaintiffs and their expert. *Johnson*, 97 *N.J.* at 93 (finding design defect as a matter of law where plaintiffs’ expert’s opinion regarding alternative design was undisputed because the defense expert did not refute the safer design presented by plaintiff; therefore, “there was no factual basis to support the [defense] expert’s conclusion that the machine was reasonably safe.”)

Here, in considering U-Haul's expert report, the motion judge conducted no critical analysis of U-Haul's opinion. Instead, he took twenty minutes during argument to review – for the first time – plaintiffs’ moving brief and U-Haul's

expert's 19 page single-spaced narrative, and to also re-read plaintiffs' expert report. R.1:6-7. (1T14-14 to 15-2.) He focused only on the mere existence of certain standards in unrelated contexts – even though U-Haul's own expert opined that they were inapplicable to U-Haul trucks. The court was required to conduct a studied analysis of this report when confronted with plaintiffs' motion, and was not permitted to pass that task off to a jury at a later time. *Kane v. Hartz Mountain Indus., Inc.*, 278 N.J. Super. 129, 144 (App.Div.1994) (finding error in the judge's failure to provide adequate guidance regarding the proper interpretation of regulations), *aff'd o.b.*, 143 N.J. 141 (1996).⁹

The expert's second conclusion is that plaintiff "increased his risk of injury because he did not use the available safety features (the handholds, loading ramp)" which would have "enabled him to exit from the truck without exposing himself from the risk of overstepping and slipping off the edge of the bed." (Pa447.) This speculative conclusion was not supported by plaintiffs' testimony or any other evidence, and was inconsistent with the stated purposes of these alleged "features."

⁹ Plaintiffs are acutely aware of the time constraints faced by members of the judiciary and the case management pressures to which judges are subject, and do not intend to disparage the motion judge in any way. Nevertheless, summary judgment motions are designed to enhance judicial efficiency by reducing trial time, as well as saving litigants significant expense. *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 541-542 (1994). Accordingly, trial courts are enjoined to conduct a "discriminating search of the record to determine whether there exists a genuine issue of material fact 'requiring disposition at trial'." *Id.* (Internal quoting reference omitted). Respectfully, this simply was not done in the proceeding below.

Moreover, it was inadmissible from a legal perspective because it improperly addressed comparative negligence related to a foreseeable use. *Cartel Capital, supra*.

The third conclusion, “[p]arking the truck away from the apartment complex” is legally irrelevant as it addresses comparative negligence, and is also devoid of reference to any standard. Additionally, the distance to the apartment had no bearing on the defective nature the truck. Even if this opinion were credible, it was not “beyond the ken of an average lay person” in considering this fact, rendering it inadmissible.

Conclusion four, regarding loading on a less than ideal day, was likewise baseless. Vehicles are loaded and unloaded every day in all kinds of weather, including rainy weather. The report cites to no standard prohibiting or recommending against moving goods on rainy days. U-Haul is aware that consumers use its vehicles in wet weather, and specifically states that their trucks are “not waterproof.” (Pa255, photo 11.)

The motion judge’s failure to provide critical analysis of these arguments was the classic example of an abuse of discretion. *See, Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002). Had the court conducted the required “discriminating review” of U-Haul's expert report, it should have concluded that the report could not have serve as the sole basis for its denial of plaintiffs’ motion.

In fact, whether – or not – the opinion is net, it did not serve as a viable basis for opposing plaintiffs’ motion because it simply did not address the elements of the safer alternative design theory pursued by plaintiffs. The failure of the motion judge to strike the expert report was prejudicial to plaintiffs in that it improperly served as the sole basis for the jury’s finding as to design defect and its admission clearly resulted in an injustice to plaintiffs. *Ahn v. Kim, supra*.

CONCLUSION

Based on the foregoing, the orders under review should be reversed and the matter be remanded for trial as to damages only.

Respectfully submitted,

s/ Frank E. Borowsky, Jr. _____
FRANK E. BOROWSKY, JR.

FRANCIS E. BOROWSKY, JR., and
PAULINA A. BOROWSKY, his wife,

Plaintiffs-Appellants,

v.

U-HAUL OF MIDDLETOWN; U-
HAUL COMPANY OF NEW
JERSEY, INC.; U-HAUL
INTERNATIONAL, INC.,

Defendants-Respondents.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
Docket No. A-002148-24

On Appeal From:
Superior Court of New Jersey
Law Division, Civil Part
Monmouth County

Docket No. MON-L-3398-21

Sat Below:
Hon. Chad N. Cagen, J.S.C.
Hon. David A. Nitti, J.S.C.

**BRIEF OF DEFENDANTS-RESPONDENTS,
U-HAUL OF MIDDLETOWN, U-HAUL COMPANY OF
NEW JERSEY, INC., AND U-HAUL INTERNATIONAL, INC.**

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- Pa Plaintiffs-Appellants', Francis E. Borowsky, Jr. and Paulina A. Borowsky, appendix.
- Pb Plaintiffs-Appellants', Francis E. Borowsky, Jr. and Paulina A. Borowsky, brief.
- Da Defendants-Respondents', U-Haul of Middletown, U-Haul Company of New Jersey, Inc., and U-Haul International, Inc., appendix.
- Db Defendants-Respondents', U-Haul of Middletown, U-Haul Company of New Jersey, Inc., and U-Haul International, Inc., brief.
- 1T Transcript of hearing on Plaintiffs-Appellants' motion for summary judgment, dated January 3, 2025.
- 2T Transcript of trial, dated February 11, 2025.

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Plaintiffs' Notice of Motion in Limine to Bar Defendants From Presenting Any Evidence Regarding Comparative Negligence and to Bar Defendants Liability Expert from Testifying as to Conclusions Two Through Four as They Are Based on Plaintiff's Conduct..... Da1

Order dated February 3, 2025, denying Plaintiffs' Motion in Limine to Bar Evidence of Plaintiff's Comparative Negligence Da3

Plaintiffs' Amended Appellate Case Information Statement, dated March 25, 2025..... Da5

PRELIMINARY STATEMENT

Defendants/Respondents, U-Haul of Middletown d/b/a U-Haul Co. of New Jersey, Inc., and U-Haul International, Inc. (collectively referred to as “Defendants” or “U-Haul”), submit this brief in opposition to Plaintiffs/Appellants’, Francis Borowsky (referred to as “Plaintiff”) and Paulina Borowsky (collectively referred to as “Plaintiffs”) appeal from the trial court’s Order denying Plaintiffs’ Motion for Summary Judgment. Plaintiffs seek reversal of the trial court’s Order denying Plaintiffs’ motion for partial summary judgment and to bar Defendants’ liability expert from testifying at trial. Notably, the only other Order Plaintiffs have appealed is the judgment itself. The case was tried to verdict and the jury concluded that the Defendants’ moving truck was not defectively designed and that the failure to provide adequate warnings with the truck was not a proximate cause of the accident. Plaintiffs’ only arguments on appeal are that the trial court erred in denying Plaintiffs’ pre-trial motion for partial summary judgment on liability and seeking to bar Defendant’s liability expert from testifying at trial. Plaintiffs have not included in their appeal any rulings made by the trial court at the time of trial. Plaintiffs’ appeal fails to identify any basis to reverse the trial court’s rulings, and the appeal should be rejected in its entirety.

Plaintiffs’ argument on appeal is that the trial court should have granted partial summary judgment in favor of Plaintiffs on the issue of liability because Plaintiffs

presented evidence of reasonable alternative designs used by some of U-Haul's competitors. Plaintiffs' argument ignores the second prong of the reasonable alternative design theory. Under the reasonable alternative design theory, the Plaintiff must prove that "the foreseeable risk of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe." Cavanaugh v. Skil Corp., 164 N.J. 1, 5 (1999) (emphasis added) (quoting Restatement (Third) of Torts: Products Liability, §2 (1998)). Simply because a feasible alternative design exists does not necessarily mean that a design that does not include the alternative design features is unsafe. Plaintiff must prove that the defendants' design was "not reasonably safe." Ibid.

There were numerous issues of material fact concerning the safety of the U-Haul design that required denial of Plaintiffs' motion. Completely absent from Plaintiffs' 47-page brief is any acknowledgement that both parties' respective liability experts tested the coefficient of friction of the truck bed edge where Plaintiff claims he slipped. Both experts concluded that the coefficient of friction, the scientific measurement of the slipperiness of a surface, was within generally acceptable limits. In other words, both experts independently tested the surface at issue and concluded that it was not unreasonably dangerous. Moreover, U-Haul provided other safety features such as grab bars to hold on to and a ramp that could

be used to access the bed of the truck without stepping on the edge. There were substantial issues of material fact that required denial of Plaintiffs' motion.

Defendants' liability expert's report and findings were also well supported by a detailed factual and scientific analysis. As noted above, U-Haul's expert performed a scientific analysis of the truck bed edge and determined that the coefficient of friction was within acceptable limits. U-Haul's expert also examined the testimony about the accident, the weather conditions, and wrote a detailed 19-page report addressing how the accident likely occurred. The report is detailed and provides an elaborate scientific analysis that well supports the conclusions offered. Accordingly, the trial court properly denied Plaintiff's motion.

Lastly, Plaintiff argues that the trial court failed to bar U-Haul from asserting the defenses of comparative fault or proximate cause at trial. Plaintiff has waived these arguments and did not appeal any such rulings. Plaintiffs appealed the denial of their motion for partial summary judgment. That motion sought partial summary judgment on liability and to bar Defendants' liability expert from testifying. Plaintiffs moved in limine before trial for an order barring the defense of comparative negligence, which motion was denied. Plaintiffs did not appeal the trial court's order denying their motion in limine. Accordingly, Plaintiffs have waived any argument that the issue of comparative negligence should not have been presented to the jury.

PROCEDURAL HISTORY

Defendant/Respondent, U-Haul, hereby adopts and incorporates Plaintiffs' procedural history subject to the following additional information. On November 22, 2024, Plaintiffs filed a motion for summary judgment requesting that the Court grant partial summary judgment in their favor, with respect to liability only, and barring U-Haul's liability expert, Dr. Zdenek Hejzlar, from testifying at trial. Pa44-45. The only issues raised by Plaintiffs' motion for partial summary judgment were the contention that the design of the U-Haul truck was defective as a matter of law and that Dr. Hejzlar's opinions were net opinions and should be barred at the time of trial. Ibid.; Pa52-53; 1T. Plaintiffs' motion for summary judgment did not seek to bar evidence of Plaintiff's comparative negligence or preclude the defense of proximate cause at trial. Ibid.

During the course of oral argument on Plaintiffs' motion for partial summary judgment, the issue of Plaintiff's comparative negligence was discussed. Plaintiffs' counsel argued that Dr. Hejzlar's opinions about Plaintiff's conduct were inadmissible and stated as follows: "And strict liability in products liability, I don't believe that comes in at all. That's comparative negligence. In a general negligence slip and fall case, yes, the Court is one hundred percent right. In a product liability design defect on the plaintiff pleads out the elements. You don't get to argue those things." 1T28-23 to 29-4 (emphasis added). At no point during the summary

judgment motion hearing or in Plaintiffs' moving papers did Plaintiffs argue that the Court should enter an Order precluding the assertion of the defense of comparative negligence or proximate cause at the time of trial. Plaintiffs' counsel argued that Defendants' liability expert should be barred from testifying about Mr. Borowsky's conduct.

After conducting oral argument on January 3, 2025, Judge Chad N. Cagan, J.S.C., appropriately denied Borowsky's motion for summary judgment, finding that there were material issues of fact that were properly left for determination by a jury. Pa404-405. The trial court issued an oral decision on the record and provided a detailed explanation of the basis for the denial of Plaintiffs' motion. 1T37-3 to 50-25.

The Court is very much satisfied under this – under the particular circumstances here that this is not a net opinion, that this expert report in fact provides the why and wherefore for the conclusions that were reached, which frankly were the same type of testing that was conducted by plaintiff, the coefficient of friction.

...

And in light of the competing expert reports and the hotly contested findings and conclusions by the experts as to whether or not there was a defective design in this vehicle, the Court finds these are questions of fact for the jury to consider.

The Court finds under the circumstances here with the competing expert reports and regarding this design of this vehicle it would be inappropriate for the Court to weigh this evidence and to determine the outcome. The Court's function today is to determine if there is a material disputed fact, and I do – I find there is a material disputed

fact. We have competing expert reports by engineers that dispute whether or not the design of the U-Haul truck was – was defectively designed. I find that that creates questions of fact for the jury to decide.

For all these reasons the Court is going to deny the application for summary judgment, and I am also going to deny the request to bar the expert report as a net opinion.

[1T46-13 to 46-19; 49-4 to 49-23 (emphasis added)].

The case proceeded to trial on February 2, 2025. Prior to the start of the trial Plaintiffs filed a motion in limine seeking to bar the defense of comparative negligence and barring Dr. Hejzlar from offering opinions based on Plaintiff's conduct. Da1. By Order dated February 3, 2025, the trial court denied Plaintiffs' motion, noting "Whether or not comparative will be charged to the jury for their consideration shall depend upon the evidence deduced at trial." Da3-4. Plaintiffs have not included the trial court's February 3, 2025, Order in their appeal. Pa542. Moreover, Plaintiffs have not appealed from the trial court's final decision to permit the jury to consider the Plaintiff's comparative negligence. Ibid. At no time did Plaintiffs ever ask the trial court to rule that the issue of proximate cause should not be submitted to the jury. Plaintiff's brief cites to 1T28 and 1T29 in support of the contention that the issue of proximate cause was raised below. The above-quoted passage from that section of the motion hearing transcript confirms that the issue of proximate cause was never raised below.

After extensive testimony and multiple days of trial, the jury returned a verdict of no cause of action, finding that the U-Haul truck at issue was not defectively designed and that any failure to provide warnings was not a proximate cause of the accident.

THE COURT: All right. In response to Question Number 1: Was the truck used by the plaintiff in this matter designed in a defective manner, how did you answer?

MR. FOREMAN: No.

THE COURT: Okay. What was the vote?

MR. FOREMAN: 7/0

THE COURT: Okay. So, you skipped Question 2 and went to Question 3, correct?

MR. FOREMAN: Yes.

THE COURT: Question 3: Did the defendants fail to provide adequate safety warnings or instructions to the plaintiff regarding the use of the truck in question?

MR. FOREMAN: We voted yes.

THE COURT: And what was the vote?

MR. FOREMAN: 7/0.

THE COURT: Then you went to Question 4, correct?

MR. FOREMAN: Yes.

THE COURT: Was the failure of the defendants to provide adequate safety warnings or instructions a proximate cause of the plaintiff's slip and fall accident? How did you answer?

MR. FOREMAN: No.

THE COURT: And what was the vote?

MR. FOREMAN: 7/0.

THE COURT: Okay. So, that's a return of a no cause verdict.

[2T141-6 to 142-21.]

A final Order for Judgment formally dismissing Plaintiffs' Complaint was filed on February 14, 2025. Pa406.

Plaintiffs originally filed a Notice of Appeal on March 21, 2025. Plaintiffs' original Notice of Appeal was deemed deficient, and an Amended Notice of Appeal was filed on March 25, 2025. Pa542.¹ The only Order identified in Plaintiffs' Amended Notice of Appeal is the Court's January 3, 2025, Order denying Plaintiffs' motion for partial summary judgment and to bar Defendants' liability expert from testifying at trial. Pa542; Pa404-405. Plaintiffs' Appellate Case Information Statement provides further information about the Orders and rulings being appealed. Plaintiffs' Appellate Case Information Statement identifies the January 3, 2025, Order denying partial summary judgment and the February 14, 2025, final Order for Judgment dismissing Plaintiffs' Complaint as the only Orders and rulings that are being appealed. Da1. Moreover, the Table of Judgments, Orders and Rulings set forth in Plaintiffs' brief pursuant to Rule 2:6-2(a)(2), identifies the trial court's January 3, 2025, and February 14, 2025 Orders, as the only Orders included in Plaintiffs' appeal. Pbix.

¹ The Amended Notice of Appeal contained in Plaintiffs-Appellants' appendix is not paginated. However, the first page of the Amended Notice of Appeal follows page Pa541 of Plaintiffs' appendix. Notwithstanding the omission of page numbers on the Amended Notice of Appeal in the Plaintiffs' Appendix, we have cited to the document as if page numbers were included.

STATEMENT OF FACTS

Plaintiffs' Statement of Facts spans more than 15 pages. Pb5-21. Plaintiffs devote a considerable portion of that discussion to describing the designs of trucks designed by U-Haul's competitors and studies concerning the potential risks and hazards associated with the use and operation of moving vans and trucks. Nowhere in Plaintiffs' more than 15-page Statement of Facts is there any discussion of the coefficient of friction testing performed by the parties' respective experts. Plaintiffs' appeal ignores these critical facts and is premised on a misstatement of the law. Plaintiffs contend that by identifying a feasible alternative design they have satisfied their burden of proof in respect of liability. Plaintiffs' argument ignores the fact that proving the existence of a reasonable alternative design is only part of the analysis. Plaintiffs must also prove that the absence of the alternative design in the Defendants' product renders the product "not reasonably safe." Cavanaugh, 164 N.J. at 5 (quoting Restatement (Third) of Torts: Products Liability, §2(b) (1998)). Simply because U-Haul did not adopt the same design features as its competitors does not automatically render its design unsafe. Plaintiffs must still prove that the U-Haul design was unsafe.

A. The Parties' Experts

There is an abundance of evidence to support the conclusion that the design of the U-Haul truck was reasonably safe. Both Plaintiffs' and Defendants' liability

experts tested the coefficient of friction of the truck bed edge where Plaintiff fell. The coefficient of friction describes the degree of friction between two surfaces and is often used by engineering experts to evaluate the slipperiness of a given surface. Plaintiffs' expert tested the coefficient of friction of the truck bed edge multiple times and obtained results between .55 and .66. Pa245. Plaintiffs' expert noted that ANSI standard A326.3-2021 provides that "it is 'generally accepted' that hard surface flooring in the 'Exterior, Wet' category should have a minimum wet DCOF [(Dynamic Coefficient of Friction)] value of .55, with 'factors other than wet DCOF also taken into consideration.'" Ibid. According to Plaintiffs' own expert, the truck bed edge where Plaintiff slipped had a coefficient of friction that was within the generally accepted range for hard surfaces when wet. Notwithstanding this analysis, Plaintiffs' expert concluded that because the surface at issue was part of a larger than normal step, the coefficient of friction should have been higher. Ibid. Plaintiffs' expert does not offer a standard or other independent basis for this conclusion, offering merely her own personal opinion. Indeed, one could very easily argue that Plaintiffs' expert's opinions, not Defendants', were net opinions based on purely personal opinions without any scientific or engineering basis.

The Plaintiffs' own expert's opinion, alone, created substantial issues of fact concerning the safety of the U-Haul design. A jury could easily conclude that because the truck bed edge had a coefficient of friction within the "generally

accepted” range established by one of the leading safety standards organizations that the design was not unreasonably dangerous or unsafe. Defendants, however, presented additional evidence to support their defense. Defendants’ expert also conducted coefficient of friction testing and concluded that the surface of the truck bed edge was reasonably safe. Defendants’ expert, Dr. Hejzlar, tested the coefficient of friction with a tribometer. Dr. Hejzlar tested three different areas using three different types of shoes. He tested the coefficient friction in both dry and wet conditions. Pa416. He obtained values ranging between .35 and .90. Ibid. After obtaining information about the type of shoes Plaintiff was wearing, he was able to compare them to the shoes used in his testing and determined that the comparable shoe produced a coefficient of friction of .57 to .90. Ibid.

After describing the tribometer testing he performed and reporting the results of those tests, Dr. Hejzlar discussed the various industry standards that may be considered when determining whether a particular surface has a reasonably safe coefficient of friction. Notably, Dr. Hejzlar is a member of the ANSI/NFSI Standards Committee B101 on Safety Requirements for Slip, Trip and Fall Prevention and the ASTM Committee F13 on Pedestrian/Walkway Safety and Footwear and participates in the drafting of standards directly relevant to the issues in dispute in this case. Pa410. Dr. Hejzlar’s report discussed in great detail the various standards that have evolved over time and notes that there is no single

standard for a coefficient of friction for walking or working surfaces in cargo or moving vans or trucks. Pa417. After discussing various voluntary standards that have not achieved general acceptance in the engineering community, Dr. Hejzlar observed that the “Tile Council of North America (TCNA) developed ANSI/TCNA A326.3 – American National Standard Test Method for Measuring Dynamic Coefficient of Friction of Hard Surface Materials.” Pa419. He observed that the 2017 version of the standard, which was in effect at the time of Plaintiff’s accident, specifies a dynamic coefficient of friction of at least .42 for tiles used for interior spaces when wet. Ibid. Dr. Hejzlar’s analysis identifies an industry standard-supported coefficient of friction that is less than the coefficient of friction relied on by Plaintiffs’ expert and concludes that the coefficient of friction for the surface of the truck bed edge was well within generally accepted standards. Ibid. Based on this analysis, he concluded that the U-Haul truck bed edge was not unreasonably slippery. Pa422.

Additionally, Dr. Hejzlar’s report presented additional opinions that the trial court was required to consider when deciding summary judgment. For example, Dr. Hejzlar’s analysis of Plaintiff’s fall challenged the assertion that Plaintiff slipped on the top side of the truck bed edge and concluded that Plaintiff actually fell forward, consistent with his foot sliding off the edge or corner of the truck bed. Dr. Hejzlar’s narrative report analyzed not only the slip resistance of the top surface of the truck

bed edge but also examined the likelihood that Plaintiff slipped on the top surface of the truck bed edge as contended. In his report he observed that had Plaintiff's foot slipped forward on the truck bed edge he would have fallen backward, not forward. Pa422; Pa424. Based on the dynamics of Plaintiff's fall as described by Plaintiff in his deposition, Dr. Hejzlar concluded that Plaintiff overstepped the edge of the truck bed and slipped over the nose or edge of the truck bed. Ibid. The core of Dr. Hejzlar's opinion as expressed in his narrative report was that Mr. Borowsky did not slip on the top surface of the truck bed edge because it was slippery. Rather, he concluded that Mr. Borowsky overstepped the edge of the truck bed and his foot landed on the leading edge or nose of the truck bed and slipped downward as his momentum carried him forward. Id. at 421-424. This theory, supported by Plaintiff's own description of the accident and the physical evidence, was not a net opinion and was among the evidence considered by the trial court when deciding Plaintiffs' motion for summary judgment.

Moreover, this theory rendered the alternative designs relied upon by Plaintiffs irrelevant. In the context of Plaintiffs' motion for summary judgment, the trial court was obligated to consider these opinions and view them in the light most favorable to U-Haul. Doing so created substantial issues of fact that required that the trial court deny Plaintiffs' motion for summary judgment.

Plaintiff also contends that Dr. Hejzlar never addressed or considered the alternative designs of U-Haul's competitors. However, Dr. Hejzlar did address Plaintiffs' expert report and referenced the reliance on alternative designs. Pa425. He stated as follows:

The Kuba report refers to Mr. Borowsky "navigating nonstandard stairs" (Page 6) in reference to the access to the cargo area when not using the provided ramp. Yet she seemingly ignores the similarities in the design of the "nonstandard stairs" (in the opinion of Kuba) on the U-Haul truck to those used to access the cargo areas of the competitors' trucks she evaluated and photographed (Photo 10). To the extent that multiple manufacturers using similar designs implies a "de facto industry standard" as opined by Kuba (Page 7), then using Kuba's own analogy, the rear cargo area step bumper and height to access the cargo area are an accepted design in the industry.

[Pa425.]

Although Dr. Hejzlar does not specifically evaluate the designs of U-Haul's competitors, he does address the reasonableness of the U-Haul design and did so based on a scientific analysis of the coefficient of friction.

Moreover, Dr. Hejzlar observed that Plaintiffs' expert relied on standards that had no application to the U-Haul truck involved in this case. Ibid. Plaintiffs rely heavily on the Health & Safety Executive Study, published in 2006 and conducted in the United Kingdom. The study does not indicate whether the U-Haul design at issue in this case was examined or whether any of the U-Haul competitors' designs were evaluated. Notably, while the study is referenced in Plaintiffs' expert report, a

copy of the study was never submitted to the trial court as part of the summary judgment motion record. Pa247.

B. Defendants' Deposition Testimony

The deposition testimony of David Simpson was also submitted to the trial court in support of Plaintiffs' motion for partial summary judgment. Mr. Simpson was asked numerous questions about the use of slip-resistant tape or "coins" in the cross member of the truck bed edge involved in Plaintiff's accident. Mr. Simpson explained why U-Haul did not use tape or coins on this area of the truck:

Q. UHI ever consider putting any applications on the galvanized steel portion to make it less slippery or more skid resistant?

A. Well, I've never had any complaints in the 40 years I've been there. But, what we do, every time a competitor, Ryder, Morgan, whoever, produces a piece of equipment, we bring it in and evaluate it. And we saw that, oh, back in 2015, somewhere in that area, some of our competitors started punching holes or coins in that surface. So, we evaluated that, as well as adhesive tape with different surfaces on it. So, we evaluated to see what advantage our competitors were getting out of it.

And we tested and evaluated and found that there was really no large advantage to it, particularly that we never had a complaint or a concern about it. The biggest problem was that when you place coins in the cross member up in the area where your hands are, particularly in that area if you're shutting the door or if you're climbing into the box or you're moving material in, that we did have a couple of complaints, I don't know if they were litigation, but a couple of complaints that people had gotten their fingers in there and had done serious damage to their fingers. That's an area that commonly sees a lot of, a lot of handling in that area. And wherever we have

those handling areas, we pay particular attention to try to make them as safe as possible.

So, when we evaluated the holes, the coins in the cross member and the tapes, we determined that it wasn't, it wasn't a move that we should make or that was needed.

[Pa220:82-3 to 83-10.]

Plaintiff ignores this testimony and evidence, which was submitted to the Court as part of Plaintiffs' motion for partial summary judgment. This evidence refutes Plaintiffs' contention that the proposed alternative designs made the truck design safer. This evidence combined with the expert analysis of the coefficient of friction of the truck bed edge created substantial issues of fact concerning the safety of the U-Haul truck design such that summary judgment could not be granted.

STANDARD OF REVIEW

The Appellate Division's review of the trial court's determination of facts is subject to a deferential standard of review, so long as they are supported by sufficient credible evidence on the record. See State v. Locurto, 157 N.J. 463, 470-471 (1999); See also Rova Farms, Inc. v. Investors Ins. Co. of America, 65 N.J. 474, 484 (1974). However, a trial court's legal determinations and application of the law are not entitled to deference and are examined under a de novo standard of review. Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995) (holding that questions of law addressed to the trial court are not entitled to deference and an appellate panel's review of legal issues is reviewed de novo.); In re Ridgefield

Park Bd. Of Educ., 244 N.J. 1, 17 (2020) (holding that an appellate court’s review of legal determinations and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo).

Consistent with these principles, the standard of review governing an appeal from the grant or denial of summary judgment is de novo. Templo Fuente v. Nat. Union Fire, 224 N.J. 189, 199 (2016) (holding “we review the trial court’s grant of summary judgment de novo under the same standards as the trial court”). As noted by the Supreme Court, the appellate court “appl[ies] the same standard that governs the trial court, which requires denial of summary judgment when the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Townsend v. Pierre, 221 N.J. 36, 59 (2015). Because the same legal standard governing the trial court’s determination of a motion for summary judgment applies to the appellate court’s review of that decision, “[i]t is not the charge of [the appellate court] to resolve material facts disputed by the parties; that is an undertaking reserved for a jury.” Whelan v. Armstrong, Inc., 42 N.J. 311, 323 (2020) (citing Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012)). Like the trial court, the appellate court must view the facts in the light most favorable to the non-moving party when evaluating the trial court’s determination of a motion for summary judgment. Winberry Realty v.

Rutherford, 247 N.J. 165, 176 (2021). Lastly, the appellate court’s function is to independently review the record to determine if there is a genuine issue of material fact, and if not, then determine whether the trial court’s application of the law was correct. Hammer v. Thomas, 415 N.J. Super. 237, 245 (App. Div. 2010), certif. den., 205 N.J. 100 (2011).

Additionally, the scope of the appeal and the issues that the appellate court is obligated to consider are determined by the Notice of Appeal. Fusco v. Newark Bd. of Educ., 349 N.J. Super. 455, 460-462 (App. Div.), certif. den., 174 N.J. 544 (2002).

As noted by this Court,

An appellant . . . proceeds at his or her peril by insufficiently completing the notice of appeal or CIS. The appellant should explicitly designate all judgments, orders, and issues on appeal in order to assure preservation of their rights on appeal. R. 2:5-1(f).

[Id. at 461 n.1.]

In Park Crest Cleaners v. A Plus Cleaners, 458 N.J. Super. 465 (App. Div. 2019), this Court noted that failing to properly identify the trial court orders or rulings in the notice of appeal is “largely fatal” to an appeal. 458 N.J. Super. at 472; see also State v. Rambo, 401 N.J. Super. 506, 520 (App. Div.), certif. den., 197 N.J. 258 (2008) (“It is fundamental of appellate practice that we only have jurisdiction to review orders that have been appealed to us.”); W.H. Indus. V. Fundicao, 397 N.J.

Super. 455, 459 (App. Div. 2008) (holding that “only the orders designated in the notice of appeal that are subject to the appeal process and review”).

Plaintiff has not properly appealed whether Plaintiff’s comparative negligence and the issue of proximate cause were properly submitted to the jury or whether Dr. Hejzlar should have been permitted to testify about Plaintiff’s conduct. The only rulings identified by Plaintiffs in their Notice of Appeal and CIS are contained in the January 3, 2025, Order denying Plaintiffs’ motion for partial summary judgment and to bar Defendants’ liability expert. The only other Order appealed is the February 14, 2025, Order formally dismissing Plaintiffs’ Complaint following the jury’s verdict. No other Orders or rulings have been appealed.

Accordingly, the only issues properly before this Court on appeal are the trial court’s decision to deny Plaintiffs’ motion for partial summary judgment on liability and to deny Plaintiffs’ motion to bar Defendants’ liability expert from testifying at trial. Whether Plaintiff’s comparative negligence and proximate cause should have been considered by the jury are not issues properly before the Court. Plaintiffs have not appealed the trial court’s Order denying Plaintiffs’ motion in limine seeking to bar the jury’s consideration of Plaintiffs’ comparative negligence. Plaintiffs had every opportunity to appeal that Order and have not done so. The failure to identify the trial court’s Order denying Plaintiffs’ motion in limine to preclude the jury from considering Plaintiff’s comparative negligence precludes Plaintiffs from seeking to

reverse the jury's verdict at this stage of the appeal based on the contention that the jury should not have been permitted to consider Mr. Borowsky's comparative negligence. R. 2:5-1(f)(2)(ii); Fusco, 349 N.J. Super. at 460-462.

Lastly, at no time did Plaintiffs raise the issue of proximate cause with the trial court. Plaintiffs' motion in limine concerning the defense of comparative negligence did not raise the issue of proximate cause as a defense that should be barred at trial. Da1-2. To the extent the Court even considers the issue despite the fact that none of the Orders or rulings being appeal related or pertain to the issue of proximate cause, the failure to raise the issue below requires the Court to apply the plain error standard of review. R. 2:10-2. Rule 2:10-2 states, "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." Ibid. "Relief under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.'" Baker v. National State Bank, 161 N.J. 220, 226 (1999). Plaintiffs must establish that the alleged error by the trial court was "clear" and "obvious," which means the error was "apparent, distinct, [and] undisguised." Jurman v. Samuel Braen, Inc., 47 N.J. 586, 590 (1966). When a party fails to object to a ruling or raise an issue before the trial court, an inference arises that the alleged error was not clear or obvious, nor that it was

harmful and need not be remedied on appeal. State v. Nelson, 173 N.J. 417, 471 (2002).

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (1T37-3 to 50-25).

There were numerous issues of genuine material fact that required the trial court to deny Plaintiffs' motion for summary judgment. Dr. Hejzlar's narrative report, which was the only evidence of Dr. Hejzlar's opinions presented to the Court in respect of Plaintiffs' motion for summary judgment, disputed not only whether the design of the truck was defective, but how Plaintiff's fall occurred. As detailed in his report, Dr. Hejzlar concluded that Plaintiff did not slip on the top surface of the crossmember at truck bed edge. Moreover, the scientific evidence established that the coefficient of friction of the crossmember was within acceptable standards and was not unreasonably slippery. These factual disputes created material issues of fact that precluded entry of summary judgment.

A. Summary Judgment Standard

When deciding a motion for summary judgment, the motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party..., are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party."

Brill v. Guardian Life Insurance Co. of Am., 142 N.J. 520, 523 (1995). If a rational factfinder could find in favor of the non-moving party, summary judgment should be denied so all parties have an opportunity to present their proofs. Ibid. The core holding of Brill, which was later codified by an amendment to Rule 4:46-2(c), is as follows: “Consistent with this national trend, we hold that under Rule 4:46-2, when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial.” Id. at 539.

The Brill summary judgment standard therefore requires a court to grant summary judgment only if “no genuine issue of material fact” exists and the movant is entitled to judgment as a matter of law, after viewing all competent evidence in the light most favorable to the non-moving party. The trial court must determine whether a rational factfinder could resolve the dispute in favor of the non-moving party. If such a dispute exists, the case must be sent to trial; if the evidence is so one-sided that only one conclusion is possible and no reasonable jury could conclude otherwise, summary judgment is appropriate.

B. Reasonable Alternative Design Theory

Plaintiffs' appeal is premised on a misapprehension of the law. Plaintiffs argue that because alternative designs were used by U-Haul's competitors and available to U-Haul that U-Haul's product is defective as a matter of law. Plaintiffs ignore the requirement that the omission of the alternative design from the product at issue must render that product "not reasonably safe." Cavanaugh, 164 N.J. at 5 (quoting Restatement (Third) of Torts: Products Liability, §2(b)). Evidence that the product is reasonably safe despite the omission of the alternative design defeats a product liability claim based on a safer alternative design theory. More importantly, Plaintiffs are required to satisfy the summary judgment standard and establish that no reasonable jury could conclude that the U-Haul design was reasonably safe. The evidence presented to the trial court through Plaintiffs' motion for partial summary judgment did not support the contention that no reasonable jury could conclude that the U-Haul design was "reasonably safe." Ibid.

Plaintiffs rely on Cavanaugh v. Skil Corp., 331 N.J. Super. 13, (App. Div.), aff'd, 164 N.J. 1, 4 (1999), in support of the contention that the trial court should have granted their motion for partial summary judgment on liability. The reasonable alternative design theory provides that "a product...is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the

alternative design renders the product not reasonably safe.” Cavanaugh, 164 N.J. at 5 (quoting Restatement (Third) of Torts: Products Liability § 2(b) (emphasis added)); see also Cavanaugh v. Skil Corp., 331 N.J. Super. 134, 162-163 (App. Div. 1999), (holding that “a plaintiff must prove that there was a reasonable alternative design and that the omission of that alternative design rendered the product not reasonably safe” (citing Conquisti v. Intersoll-Rand Co., 306 N.J. Super. 126, 139 (App. Div.1997))), aff’d as mod., 164 N.J. 1 (2000). Plaintiffs ignore the requirement that the Plaintiff must show that Defendant’s omission of the alternative design rendered the product not reasonably safe. Id.

The Cavanaugh decision addressed a discrete issue that is not present in this case. In Cavanaugh the issue before the Court was how to allocate the burden of proof at trial where the product liability defendant argues that its design was state-of-the-art and the plaintiff contends that there is a reasonable alternative design that would make the product safer and/or eliminate the hazard involved. Id. at 4. The Court concluded that it was the defendant’s burden to prove that the design of the product met the state of the art in the industry when it left its control. Ibid. The plaintiff carries the burden of proving that when the product was manufactured its design did not conform to the feasible alternative design. Ibid. Nowhere in the Cavanaugh decision does the Court conclude that a plaintiff who proves the existence of a feasible alternative design is entitled to summary judgment without

also proving that the defendant's design was not reasonably safe. Plaintiffs extrapolate from the Court's articulation of the parties' respective burdens of proof at trial in a case involving the state-of-the-art defense that they are entitled to summary judgment on liability. Pb23. The leap of logic that is at the core of Plaintiffs' argument is undermined by the fact that Defendants did not assert the state-of-the-art defense in this case. Defendants do not dispute that feasible alternative designs existed. Rather, Defendants dispute that the design used by U-Haul was not a reasonably safe design.

The elements of a product liability claim are set forth in N.J.S.A. 2A:58C-2.

A manufacturer or seller of a product shall be liable in a product liability action only if the claimants proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

N.J.S.A. 2A:58C-3(a)(1) sets forth the state-of-the-art defense. The statute provides that a "manufacturer or seller shall not be liable if . . . [a]t the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product." The Cavanaugh decision addresses the interplay between the plaintiff's burden of

proving a design defect and the defendant's assertion of the state-of-the-art defense. The state-of-the-art defense was not an issue in this case. Accordingly, it remained Plaintiffs' burden to prove that the U-Haul design "was not reasonably fit, suitable or safe for its intended purpose." N.J.S.A. 2A:58C-2.

Plaintiffs argue that because an alternative design exists it is safer. The argument ignores the coefficient of friction testing done by the parties' respective experts. Both experts tested the galvanized steel crossmember on which Plaintiff contends he slipped and determined that the coefficient of friction was within generally acceptable limits for such a surface. Pa245; Pa416-419. While it may be possible to design a surface with a higher coefficient of friction, Plaintiffs' burden is to prove that the design used by U-Haul was not reasonably safe. N.J.S.A. 2A:58C-3. Evidence that the coefficient of friction for the top surface of the crossmember complied with generally accepted standards is credible evidence on which a reasonable jury could rely to conclude that the U-Haul design was not defective and was reasonably safe.

Plaintiffs fail to cite a single reported decision in which the court granted summary judgment in favor of the plaintiff based solely on the existence of a feasible alternative design. Plaintiffs cite Johnson v. Salem Corp., 97 N.J. 78 (1984), arguing that Johnson compelled the trial court to grant summary judgment. Initially, it is worth noting that the issue in Johnson was not whether summary judgment should

have been granted but whether the trial court properly granted a judgment notwithstanding the verdict pursuant to Rule 4:40-2. In Johnson the defense liability expert acknowledged that there was no guard on the machine at issue, which exposed operators to a dangerous nip point. 97 N.J. at 87. The expert further conceded that he had no knowledge of any steps taken by the manufacturer of the machine to eliminate the risk of an accidental start up. Ibid. Notably, the defense expert concluded that the machine was safe because it included a stop button in its design. Id. at 89. The trial court concluded that there was no stop button on the machine as evidenced by photographs that were moved into evidence at trial. Ibid. Accordingly, one of the essential elements of the expert's opinions was conclusively disproven at trial. Ibid.

The second basis for the defense expert's opinions in Johnson was that there was a stop bar on the machine that could be used to stop the machine when an operator was working in close proximity to the nip point. Ibid. The plaintiff's theory was that at the time of manufacture, use of nip point guarding was well known in the industry and that accidental start-ups were a known hazard with machines of this nature, such that a nip-point guard should have been incorporated into the design. Id. at 80-90. During his trial testimony, the defense expert conceded that the stop bar would not protect against accidental start-ups. Id. at 90. In light of this concession and the evidence refuting the existence of a stop button, the Court concluded that

there was no factual basis for the defense expert's opinion that the machine was reasonably safe. Ibid.

Significantly, the Johnson case followed the risk-utility analysis and did not address the reasonable alternative design theory advanced by Plaintiffs in this case. Id. at 88-89. The Court framed the issue as "whether defendants met their burden of showing that the utility of the product outweighs its risks in light of all the relevant evidence, including compliance with the state-of-the-art." Id. at 89. The Court ultimately concluded that the defense expert's opinion "was infirm in both its factual foundation and inherent reasoning." Id. at 91.

Such a statement cannot be made about Dr. Hejzlar's opinions in this case. Dr. Hejzlar's opinions are well-founded opinions based on scientific analysis of physical evidence. Dr. Hejzlar tested the slip resistance of the crossmember and determined, like Plaintiffs' own expert, that the crossmember was not unreasonably slippery. Pa416-424. Moreover, unlike the expert in Johnson, Dr. Hejzlar observed that there were other design features on the truck that addressed the hazard of falling from the truck bed, including grab bars and a ramp, which Plaintiff chose not to use despite the wet and rainy conditions. Pa427. Moreover, Defendants testified that they considered their competitors' designs and concluded that they were not materially better or safer overall designs. Pa220:82-3 to 83-10. Use of coins on the crossmember, for example, presented a potential injury risk to individuals' fingers

and hands. Ibid. Moreover, Dr. Hejzlar's report challenged the very manner in which Plaintiff contends he fell and offered the opinion that the accident was not caused by Plaintiff slipping on the top surface of the crossmember. Pa421-424. The facts and evidence before the trial court at the time of Plaintiffs' motion for summary judgment were dramatically different than the evidence presented at trial in Johnson. There is an abundance of evidence to support the trial court's conclusion that there were substantial issues of material fact.

It is important to pause and note that Plaintiffs have not appealed any rulings made during the trial. Plaintiffs also have not appealed from the jury's verdict arguing that the jury's verdict was against the weight of the evidence. Plaintiffs' appeal presents the unusual circumstance in which a party has appealed the trial court's denial of summary judgment prior to trial but has not appealed the jury's verdict rejecting their claim. Plaintiffs' failure to appeal the jury's verdict as against the weight of the evidence undermines the credibility of the contention that no reasonable jury could have concluded that the U-Haul design was reasonably safe and not defective. The truth is that there was an abundance of evidence upon which a reasonable jury could conclude that the U-Haul design was reasonably safe for its intended use. That evidence, detailed above, required the trial court to deny Plaintiffs' motion for summary judgment and supports the jury's verdict.

Plaintiff also relies on the Appellate Division's decision in Mettinger v. W.W. Lowensten, Inc., 292 N.J. Super. 293 (App. Div. 1996), aff'd sub nom, Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371 (1998). Significantly, the Mettinger case, like the Johnson case, does not involve the grant or denial of summary judgment based on evidence of a feasible alternative design. The Mettinger decision affirmed the jury's verdict in favor of the plaintiff. The defendant in Mettinger appealed the jury's verdict finding that its deli meat slicer was defective because it did not include an interlocked guard. The primary allegation of error raised by the defendant was the use of the consumer expectation test in the jury instructions. 292 N.J. Super. at 309. The Appellate Division concluded that the facts of the case supported use of the consumer expectation test and that the trial court did not err when giving that charge. Ibid. The court also expressed agreement with the plaintiff's argument that even if it were error to have given the consumer expectation charge, it was harmless because plaintiff's motion for a directed verdict on liability should have been granted. Id. at 309-310. The court concluded that even if there were other factual disputes that justified denial of plaintiff's motion for a directed verdict the "court could properly have decided as a matter of law that the Globe model 500 food slicer was defectively designed." Id. at 310. The court noted that the defendant's expert conceded all of the facts on which the plaintiff's expert relied. Ibid. The only argument advanced by the defendant was that none of the other manufacturers used

such a design at the time and thus the issue of whether the design was defective was an issue for the jury to decide. Id. at 310-311. Unlike U-Haul's liability expert in this case, the defense in Mettinger did not provide any evidence to support the contention that the design at issue was, in fact, a reasonably safe design. The court rejected the assertion that simply because everyone else designed it that way it was a reasonably safe design.

Plaintiffs again ignore the substance of Dr. Hejzlar's opinions and the evidence presented to the trial court in the context of the motion for summary judgment. Dr. Hejzlar analyzed the slip resistance of the crossmember and examined numerous industry standards. Based on his scientific analysis, inspection of the truck, and review of the relevant discovery produced by the parties, he concluded that the design was not unreasonably dangerous or unsafe. That conclusion is well-supported by the coefficient of friction testing, the existence of grab bars and the presence of a loading ramp. Moreover, Mr. Simpson from U-Haul testified that U-Haul considered the alternative designs and concluded that they did not make the truck safer because of other potential hazards created by the alternative designs.

Furthermore, Plaintiffs are simply wrong when they argue that Defendants' expert did not address the alternative designs. While Dr. Hejzlar does not conclude that the alternative designs were not feasible, he does conclude that the U-Haul design was not less safe. He references the alternative designs in his report noting

that Plaintiffs' expert selectively chooses the aspects of the competitors' designs that suit her conclusions and ignores other similarities to the U-Haul design that support the conclusion that the U-Haul design was reasonably safe. Pa425. Again, U-Haul was not obligated to prove that its competitors' designs were not safe or feasible. U-Haul simply had to prove that its truck was "reasonably fit, suitable or safe for its intended purpose." N.J.S.A. 2A:58C-2.

Plaintiffs' reliance on the 2006 Health & Safety Executive study and the designs of U-Haul's competitors is simply unpersuasive and does not establish Plaintiffs' right to summary judgment. Plaintiffs reference anti-slip material used on truck bed edges in trucks owned by competitors of U-Haul and support this position by relying on photographs of four (4) trucks allegedly owned by U-Haul competitors. Plaintiffs also argue that the Health & Safety Executive study published in 2006 in the United Kingdom somehow proves as a matter of law that the U-Haul truck was defectively designed. These arguments fail to prove that U-Haul's design of their truck was not reasonably safe. Just because competitors utilize alternative designs does not mean that U-Haul's design was not reasonably safe.

Plaintiffs also attempt to argue that reliance on case studies proves that the U-Haul design was unsafe. Citing Granzka v. Pfeiffer, 301 N.J. Super. 564 (App. Div. 1997), certif. den., 154 N.J. 607 (1998), Plaintiffs contend that studies establishing the foreseeability of falling from a cargo truck prove that U-Haul's design was not

reasonably safe. Pb32. Simply because studies identify fall hazards as foreseeable does not prove that the U-Haul design was not reasonably safe. Again, Plaintiffs ignore the coefficient of friction analysis performed by U-Haul's expert and Plaintiffs' own expert, which established that the galvanized steel crossmember Plaintiff contends that he slipped on was not unreasonably or dangerously slippery when wet. Plaintiff also ignores the fact that U-Haul provided other safety features, including grab bars and a loading ramp to assist users and protect against potential falls. Studies establishing the foreseeability of a risk do not prove that a given design is defective or not reasonably safe.

C. Dr. Hejzlar's Opinions are Not Net Opinions

The trial court correctly found that opinions of U-Haul's expert were not net opinions, and that the parties' conflicting expert reports created genuine issues of material fact that required the determination of a jury. N.J.R.E. 702 and 703 govern expert testimony. N.J.R.E. 703 forbids admission of an expert's conclusions that are not supported by factual evidence or other data. See N.J.R.E. 703. To admit testimony as expert testimony, three essential elements are required: (1) the intended testimony must deal with a subject matter that goes beyond the understanding of an average juror; (2) the field being testified about must be at an advanced state, ensuring that an expert's testimony is reliable; and (3) the witness offering the testimony must possess sufficient expertise in the relevant area. See Creanga v.

Jardal, 185 N.J. 345, 355 (2005) (quoting Kemp ex rel. Wright v. State, 174 N.J. 412, 424 (2002) (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992))). The net opinion rule “requires that an expert “‘give the why and wherefore’ that supports the opinion, ‘rather than a mere conclusion.’” Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)(quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)(quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011))). N.J.R.E. 703 “requires that an expert opinion be supported by facts or data either in the record or of a type usually relied on by experts in the field.” Scully v. Fitzgerald, 179 N.J. 114, 129 (2004); see also Pomerantz Paper Corp., 207 N.J. at 372 (holding that “an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered”). It does not however, “mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable” Townsend, 221 N.J. at 54-55.

The opinions expressed by Dr. Zdenek Hejzlar in his narrative report were based on Dr. Hejzlar’s numerous tests, through which he utilized industry standards and procedures to substantiate his findings, as well as his inspection of the truck, and voluminous discovery, including deposition testimony describing the accident. Dr. Hejzlar’s narrative report was the only evidence of Dr. Hejzlar’s opinions before the trial court when deciding Plaintiffs’ motion and the court was required to consider

all of the opinions expressed in the report in the light favorable to U-Haul. The report documented Dr. Hejzlar's slip resistance testing of the crossmember and determination, like Plaintiffs' own expert, that the crossmember was not unreasonably slippery based on the coefficient of friction testing. Pa416-424. Moreover, Dr. Hejzlar observed that there were other design features on the truck that addressed the hazard of falling from the truck bed, including grab bars and a ramp, which Plaintiff chose not to use despite the wet and rainy conditions. Pa427. Dr. Hejzlar's report challenged the very manner in which Plaintiff contends he fell and offered the opinion that the accident was not caused by Plaintiff slipping on the top surface of the crossmember. Pa421-424. Dr. Hejzlar's detailed 19-page report analyzes numerous industry standards and discusses which of those standards is applicable to the design of the U-Haul truck. Pa417-419. The detailed report provides the "why and wherefore" required by N.J.R.E. 702 and 703 and does not contain net opinions.

Dr. Hejzlar's report also discussed Plaintiff's own testimony when expressing his opinions concerning how the accident occurred. On pages 12 and 13 of his report, Pa420-421, Dr. Hejzlar quotes Plaintiff's deposition testimony describing the accident. Plaintiff testified as follows:

Q. I am, in that question. Why don't you tell me how you fell first and then we'll use the photo.

A. Okay. Put the desk on the truck; I was walking to the back of the truck; I was going to step down

onto that bumper; and as I was stepping down my foot slipped off the smooth edge of the bed.

Q. Which foot were you stepping down with?

A. I believe I had – I was stepping down with my right foot, so my left foot would be on the bed.

[Pa110:57-7 to 17.]

Q. Describe what happened to your left foot when you stepped onto the approximate area with the “X” in P-181?

A. Well, I mean, it was a fluid single motion that happened in less than a second, I’m sure, but as I was stepping down with my right foot onto the bumper to exit the vehicle my left foot slipped on this edge and I went down.

[Pa113:61-3 to 10.]

Dr. Hejzlar also included in his report the photograph referenced in Plaintiff’s deposition identifying the “edge” where Plaintiff’s contends he slipped. Pa421. This evidence suggests that Plaintiff slipped on the corner or nose of the crossmember and not the top surface as concluded by Dr. Hejzlar. Dr. Hejzlar’s analysis is based on a careful review of the evidence and is well-supported by that evidence. The opinions offered by Dr. Hejzlar are the furthest thing from net opinions and the trial court properly rejected Plaintiffs’ arguments on these issues.

Plaintiffs also argue that Dr. Hejzlar should not have been permitted to offer the opinion that “[t]he systems safety provided by the U-Haul subject truck design enables prudent users to accomplish loading and unloading in a safe manner and is not unreasonably dangerous.” Pa427. Plaintiffs argue that such an opinion relates to

the risk-utility factors, which are irrelevant to a safer alternative design theory. Plaintiffs cite the Appellate Division's decision in Cavanaugh in support of these arguments. Pb42 (citing Cavanaugh, 331 N.J. Super. at 162). Plaintiffs' reading of the Appellate Division's decision in Cavanaugh is incorrect. Nowhere on page 162 of the decision does the court say that the risk-utility factors are not relevant to analyzing a plaintiff's claim under the safer alternative design theory. In fact, on the very next page the court states precisely the opposite principle of law:

Unfortunately, the new Restatement (Third) design defect theory was not reduced to a model jury charge at the time of trial. While the absence of such a model jury charge certainly does not preclude a trial judge from instructing the jury that a plaintiff must prove that there was a reasonable alternative design and that the omission of that alternative design rendered the product not reasonably safe, Conguisti v. Ingersoll-Rand Co., 306, N.J. at 139, 703 A.2d 340, the fact remains that the risk-utility analysis is still used when a plaintiff posits this theory. Lewis v. American Cyanamid Co., 155 N.J. at 571, 715 A.2d 967. According to the Lewis Court, a plaintiff who like plaintiff here, asserts 'that the product could have been designed more safely must prove under a risk-utility analysis the existence of an alternative design that is both practical and feasible.'" Ibid.

[Cavanaugh, 331 N.J. Super. at 162-163 (emphasis added).]

It is simply not correct to state that the risk-utility factors are not relevant to a design defect claim based on a reasonable alternative design theory. The Cavanaugh decision does not make such a statement.

More importantly, Dr. Hejzlar's first opinion is entirely relevant to the issues in this case and directly addresses Plaintiffs' theory of liability. Dr. Hejzlar tested the slipperiness of the galvanized steel crossmember and determined that the coefficient of friction was not unreasonably dangerous. He identified additional safety features on the truck, including grab bars and a ramp, which Plaintiff could have used to assist in getting down from the truck bed safely. As stated by the Cavanaugh court, "the fact remains that the risk-utility analysis is still used when a plaintiff posits" the reasonable alternative design theory. Id. at 163. Dr. Hejzlar's comments about the prudent use of the truck are entirely appropriate and directly relevant in light of the facts of the case. Plaintiff was loading the truck in the rain. He knew that the soles of his shoes were wet and that the crossmember was likely wet. At the time of Plaintiffs' summary judgment hearing, it was an established fact that Plaintiff had climbed in and out of the cargo area 7 to 10 times without incident before his fall. Pa91:38-1 to 16. Plaintiff climbed in and out of the truck using the same step and edge of the truck bed each time. Pa91:38-17 to 25; Pa92:40-20 to 41-4. A reasonable jury could easily infer that having climbed in and out of the truck over the very same area where he eventually fell, Plaintiff observed the crossmember and was well aware of the weather conditions and the presence of water. Pa95:42-7 to 20. Plaintiff's deposition testimony was evidence presented to the trial court through Plaintiff's motion for summary judgment and was properly considered by

the court. Based on that evidence a reasonable jury could conclude that a prudent reasonable person would have used the grab bars or the ramp to assist in getting down from the truck bed to avoid a fall. Accordingly, a reasonable jury could conclude that the design of the truck was reasonably safe for its intended use. The fact that others incorporated other design features does not automatically make U-Haul's design defective or not reasonably safe.

Plaintiffs contend that Dr. Hejzlar should not have been permitted to offer testimony about Plaintiff's conduct. Specifically, Plaintiffs contend that opinions 2, 3, and 4 set forth in Dr. Hejzlar's report should have been barred at trial. Significantly, Plaintiffs filed a separate motion in limine seeking to bar these specific opinions after the denial of their motion for partial summary judgment. Da1. That motion was denied. Da3-4. Plaintiffs have not appealed that order. Accordingly, the only issue before the Court is whether Dr. Hejzlar's opinions are net opinions. The question of whether Plaintiff's comparative negligence was properly submitted to the jury and whether Dr. Hejzlar should have been permitted to discuss Plaintiff's conduct have not been appealed and are not issues before this Court.

Opinions 2, 3, and 4 set forth in Dr. Hejzlar's report are as follows:

2. Mr. Borowsky increased his risk of injury because he did not use the available safety features (the handholds, loading ramp) of the truck that would have enabled him to exit from the truck without exposing himself to the risk of overstepping and slipping off the edge of the bed.

3. Parking the truck away from the apartment complex increased the potential of tracking water and outside contaminants onto the truck bed.
4. Loading in the rain increases potential for loss of footing that can be mitigated by using the safety design features such as the handholds and the loading ramp.

[Pa427.]

Plaintiffs contend that evidence of Plaintiff's comparative negligence, and therefore, his conduct in general, should not have been admissible at trial. Putting aside for a moment that Plaintiffs have not properly appealed that issue, there was more than sufficient evidence to support a defense of comparative or contributory negligence in this product liability case. Initially, it is important to note that evidence of a plaintiff's negligent conduct may be relevant for different reasons, even if the defense of comparative negligence is not applicable to the case. Jurado v. Western Gear Works, 131 N.J. 375, 387 (1993). Plaintiff's conduct in this case was certainly relevant to the proximate cause of the accident. That is particularly true in the context of Plaintiffs' motion for summary judgment. Dr. Hejzlar's report concluded that Plaintiff did not slip on the top surface of the crossmember but overstepped the crossmember and slid forward off the edge of the truck bed. Indeed, this is exactly how Plaintiff described the fall in his deposition. Pa110:57-7 to 17; Pa113:61-3 to 10. Plaintiffs ignore the fact that Dr. Hejzlar's report analyzed the fall sequence as described by Plaintiff and the physical evidence and concluded based on that evidence that Plaintiff did not slip on the top surface of the crossmember. This

opinion is not speculation or a personal opinion as suggested by Plaintiffs. Rather, Dr. Hejzlar's opinion is based on a careful and thorough scientific analysis of the evidence and is well-supported by that evidence. Most importantly, this was an opinion contained in Dr. Hejzlar's report and that was part of the record considered by the trial court when deciding Plaintiffs' motion for summary judgment. The court was required to view this evidence in a light favorable to Defendants and to allow all reasonable inferences from that evidence when deciding Plaintiffs' motion.

Plaintiffs' negligent conduct was also properly presented to the jury in support of a comparative negligence defense. The comparative negligence defense in a product liability action requires evidence that the Plaintiff was aware of and voluntarily encountered the risk or hazard that caused the injury. Lewis, 294 N.J. Super. at 78-79. Unlike the missing guard in Crumb v. Black & Decker (U.S., Inc.), 204 N.J. Super. 521, 530 (App. Div. 1985), or the danger of a fire or explosion from a can of insect fogger in Lewis, the hazard of a wet, slippery metal crossmember at the edge of the truck bed was openly observed by Plaintiff. Plaintiff knew that the ground and his shoes were wet, Pa96:43-18 to 44-6, and could openly see that there was a smooth metal surface at the end of the truck bed. A jury could easily have concluded that Plaintiff voluntarily encountered a known risk by climbing in and out of the truck cargo area without using grab bars or a ramp on a rainy day.

Plaintiffs' arguments fail to address the ultimate legal issue, whether Dr. Hejzlar's opinions are net opinions. The trial court was correctly focused on this question.

But the issue is whether this is a net opinion. I am very much satisfied based on this record that this expert report provides the why and wherefore. They – this expert reports sets forth how they conducted a scientific slip resistance testing, the coefficient of friction. They applied applicable standards. They examined the actual truck. They distinguished the findings set forth frankly in also Ms. Kuba's report. But this is not simply a report that sets forth a conclusion without any analysis. Quite to the contrary. This report sets forth all these testing and review of scientific literature, standards and codes, inspection, and tribometry testing of the subject truck.

The Court is very much satisfied under this – under the particular circumstances here that this is not a net opinion, that this expert report in fact provides the why and wherefore for the conclusions that were reached, which frankly were the same type of testing that was conducted by plaintiff, the coefficient of friction.

[1T45:24 to 46:19.]

Judge Cagan further emphasized this point by stating,

THE COURT: Okay. So if in fact the defendant's engineers did the slip resistance testing, then they have a basis for their opinion as to whether it was defectively designed or dangerous –

[1T26:23 to 27:7.]

Dr. Hejzlar's opinions are well-supported opinions based on a detailed analysis. They are supported by facts and evidence, as well as scientific testing and analysis.

Dr. Hejzlar also examined multiple standards and determined that the U-Haul design was not a dangerous or defective design. The Court properly denied Plaintiffs' motion to bar his expert report.

II. PLAINTIFFS HAVE NOT PROPERLY APPEALED THE TRIAL COURT'S DECISION TO SUBMIT THE ISSUE OF COMPARATIVE NEGLIGENCE TO THE JURY AND THE ISSUE WAS PROPERLY SUBMITTED TO THE JURY (Da3-4).

Plaintiffs did not appeal the trial court's ruling denying their motion in limine seeking to bar evidence of Plaintiff's comparative negligence and barring Dr. Hejzlar from commenting on Plaintiff's negligent conduct at trial. The only Order Plaintiffs have appealed is the trial court's January 3, 2025, Order denying Plaintiffs' motion for partial summary judgment and motion to bar Dr. Hejzlar's opinions as net opinions. Plaintiffs filed a separate motion in limine seeking to bar Dr. Hejzlar from offering opinions about Plaintiff's negligent conduct and to prevent the jury from considering the defense of comparative negligence. Da1. The court denied that motion. Da3-4. Plaintiffs' Notice of Appeal and Appellate CIS do not identify the trial court's February 3, 2025, Order denying Plaintiff's motion in limine as among the rulings or orders being appealed. Pa542; Da5. Accordingly, the issue of whether the jury was properly permitted to consider Plaintiff's comparative negligence is not before the Court. R. 2:5-1(f)(2)(ii); Fusco, 349 N.J. Super. at 460-462.

Additionally, as noted above, there was ample evidence of Plaintiff knowingly encountering the risk of a slippery metal edge on the truck bed. Plaintiff climbed in and out of the truck 7 to 10 times before the fall. He knew it was raining and wet. He knew his shoes were wet. He knew there was a bare metal crossmember at the end of the truck bed. He knew there were handles and a ramp he could use to assist getting in and out of the cargo area. He knew all of these facts and chose to climb in and out of the cargo area without using the grab bars or ramp. A reasonable jury could have considered these facts and concluded that Plaintiff was comparatively negligent under the modified comparative negligence defense applicable to product liability claims. Accordingly, the issue was properly submitted to the jury.

It is important to note that the jury never reached the issue of Plaintiff's alleged comparative negligence. Rather, the jury concluded that the design of the U-Haul truck was not defective. This is likely based on the coefficient of friction testing performed by Plaintiffs' and Defendants' respective experts. The only other aspect of the verdict was the jury's conclusion that U-Haul did not provide adequate warnings and that the failure to provide such warning was not a proximate cause of the accident. Plaintiff has not appealed any aspect of the jury's verdict, including the jury's determination of Plaintiffs' failure to warn claim. Accordingly, the issue of Plaintiff's comparative negligence is ultimately irrelevant.

III. THE ISSUE OF PROXIMATE CAUSE WAS NEVER RAISED BELOW AND IS NOT PROPERLY BEFORE THE COURT (Not Raised Below).

Plaintiffs also contend that the issue of proximate cause, like comparative negligence, should not have been submitted to the jury. Like the issue of comparative negligence, Plaintiffs did not seek a ruling from the Court in the context of their motion for partial summary judgment that the issue of proximate cause should be taken away from jury at trial. Plaintiffs' motion for summary judgment simply did not raise the discrete question of proximate cause as an issue that should be decided in Plaintiffs' favor as a matter of law. A review of the transcript of oral argument reveals that the term "proximate cause" was referenced only once by the trial court when describing the individual counts of Plaintiffs' Complaint. 1T38-9 to 10. Moreover, the section of the transcript cited by Plaintiffs as evidence that the issue of comparative negligence and proximate cause were part of their summary judgment motion, does not include any reference to proximate cause whatsoever. 1T28-1 to 29-25.

In the event the Court is inclined to even consider the issue of proximate cause in the context of this appeal, the fact that it was not raised below requires application of the plain error standard. R. 2:10-2. Plaintiff must establish that the alleged error was clear and obvious and clearly capable of producing an unjust result. Jurman, 47 N.J. at 590. Additionally, "[t]he issue of proximate cause is ordinarily left the

factfinder.” Townsend, 221 N.J. at 59-60 (citing Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (citing Scafidi v. Seiler, 119 N.J. 93, 101 (1990)); J.S. v. R.T.H., 155 N.J. 330, 351 (1998) (citing Marin v. Bengue, Inc., 25 N.J. 359, 374 (1957))); Broach-Butts v. Therapeutic Alts., Inc., 456 N.J. Super. 25, 39 (App. Div. 2018) (“Ordinarily, issues of proximate cause are considered to be jury questions.” (quoting Perez v. Wyeth Lab., 161 N.J. 1, 27 (1999))). It is only in the “extraordinary case in which reasonable minds could not differ on whether that issue has been established” where a court may decide the issue of proximate cause as a matter of law. Fleuhr, 159 N.J. at 543 (citing Vega by Muniz v. Piedilato, 154 N.J. 496, 509 (1998)).

Applying these principles to the trial court’s disposition of Plaintiffs’ motion for summary judgment leads to one conclusion—there were substantial issues of fact concerning the proximate cause of Plaintiff’s accident. Dr. Hejzlar’s report provided an evidence-based theory that rendered the alleged defect in the truck bed edge irrelevant. In the context of Plaintiffs’ motion for summary judgment the trial court was required to view the evidence in favor of the Defendants position. Moreover, there was ample evidence on which a jury could conclude that the proximate cause of the accident was Plaintiff’s failure to use the handles and/or ramp when getting in and out of the truck. Plaintiffs have not offered any factual or legal arguments to support the assertion that the issue of proximate cause should not have been submitted to the jury. Moreover, in the context of the plain error standard, Plaintiffs have failed

to demonstrate that the court's failure to take the issue of proximate cause from the jury led to an unjust result. The jury never reached the issue of proximate cause in respect of Plaintiffs' design defect claim and Plaintiffs have not appealed the jury's verdict in respect of the failure to warn claim. Accordingly, the issue of proximate cause was properly submitted to the jury.

CONCLUSION

For all of the foregoing reasons, Defendant-Respondent, U-Haul, respectfully requests that the Court affirm the trial court's decisions and dismiss Plaintiffs-Appellants' appeal.

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* The briefs that were submitted in the trial court are submitted pursuant to R.2:6-1(a)(2) in response to defendants’ fallacious argument that certain issues were not raised in the proceedings below.

PRELIMINARY STATEMENT

Almost thirty years ago, New Jersey formally adopted the *Restatement of Torts (Third)* “reasonable alternative design” test for product liability design defect claims. That test has two elements, requiring proof of: (1) the existence of a reasonable alternative design, and (2) that the omission of that design renders the product unreasonably safe. Our courts have also adopted *Comment f.* of the *Restatement*, which sets forth the factors comprising the second element, the lynchpin of which is “the magnitude of probability of the foreseeable risk of harm.”

In this case, plaintiffs presented a well-supported motion for summary judgment as to U-Haul's liability with unrefuted and indisputable facts establishing both elements. They offered several readily ascertainable safer design alternatives that are already in almost universal use, as well as evidence of the “magnitude of the probability of the risk of harm” presented by falls from trucks, especially those with smooth edges at their exit/entry thresholds.

That motion, which sought a trial on damages only, necessarily incorporated comparative negligence and proximate causation within its purview. Plaintiffs’ summary judgment brief addressed those issues, and U-Haul did not oppose them. U-Haul's overwrought and repetitive assertion that this issue was not raised on the motion subject to appeal is false. Nevertheless, as set forth in plaintiff’s initial

brief, plaintiff's actions simply did not constitute comparative negligence or proximate cause as those concepts are applied in the product liability setting. The court's failure to grant plaintiffs' motion on that issue alone requires reversal.

Although U-Haul argues that its expert report's references to various coefficient of friction standards somehow addressed the second element of the *Restatement* test, they are irrelevant to that analysis, especially given the admission that none of those standards apply to U-Haul. The expert's concession of foreseeability and his failure to address safer design alternatives rendered his opinion useless and it should not have been considered. His other opinions were likewise inadmissible because they lacked a factual foundation, were just plain wrong, or legally irrelevant.

PROCEDURAL HISTORY

Plaintiffs adopt the procedural history set forth in their initial brief.

STATEMENT OF FACTS

Plaintiffs add the following to their initial Statement of Facts to address U-Haul's egregiously false argument that plaintiffs have not properly appealed the issues of comparative negligence and proximate cause. "Point 3" of plaintiffs' motion for summary judgment was entitled "COMPARATIVE NEGLIGENCE AND PROXIMATE CAUSE ARE NOT AVAILABLE TO THE DEFENDANTS AS DEFENSES," and addressed these issues head-on. (Plaintiffs' supplemental

appendix (“Psa”) 20.) U-Haul did not address this argument in its opposition brief (Psa29), leading to plaintiffs, in their reply brief, to argue that U-Haul waived it: “PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT SEEKING TO STRIKE U-HAUL’S COMPARATIVE NEGLIGENCE AND PROXIMATE CAUSE DEFENSE IS UNOPPOSED AND MUST BE GRANTED.” (Psa61.)

POINT I

AS A MATTER OF LAW PLAINTIFFS ESTABLISHED BOTH ELEMENTS OF THE *RESTATEMENT’S* REASONABLE ALTERNATIVE DESIGN TEST

New Jersey has adopted the *Restatement (Third) of Torts: Products Liability*, §2(b) (1998), which is commonly referred to as the “reasonable alternative design” test. *Cavanaugh v. Skil Corp.*, 164 N.J. 1, 4 (2000). This theory consists of two elements and requires proof “that there was a reasonable alternative design and that the omission of that alternative design rendered the product not reasonably safe.” *Cavanaugh v. Skil Corp.*, 333 N.J.Super. 134, 162-63 (App.Div.1999), *aff’d*, 164 N.J. 1 (2000), *citing*, *Restatement (Third) of Torts: Products Liability*, § 2(b) (1998).

According to the *Restatement*, the prime consideration in determining whether the “omission” of the alternative design “renders a product not reasonably safe” is “the magnitude and probability of the foreseeable risk of harm.” *Berkoski v. American Honda Motor Co., Ltd.*, 480 N.J.Super. 379, 392-93 (App.Div.), *quoting*, *Restatement (Third) of Torts: Product Liability* §2, cmt. f

(1998), *certif. denied*, 260 N.J. 310 (2025). *See also*, *Grzanka v. Pfeifer*, 301 N.J. Super. 563, 575 (App.Div.1997), *certif. denied*, 154 N.J. 607 (1998) (also noting the “second aspect of the ‘reasonable alternative design’ test,” and stating: “Without proof of a reasonably foreseeable risk, **so that** ‘the omission of the alternative design renders the product not reasonably safe,’ plaintiffs’ alternative design fails to meet the full test.”)

In this case, on their motion for summary judgment, plaintiffs submitted unrefuted evidence of both elements of the *Restatement* test. They established the existence of multiple obvious safer alternative designs that were already in use by U-Haul and its competitors. (*See*, Pb4-11.) Plaintiffs also presented evidence, in the form of a judicially noticeable government study, which also cited other governmental studies, that statistically established the “magnitude and probability of the foreseeable risks” of bare metal edges of delivery vehicles. (Pb11-14, Psa56.) Thus, plaintiffs established both elements of the *Restatement* test by unrefuted evidence through expert opinion and common knowledge. *See*, *Scanlon v. General Motors Corp.*, 65 N.J. 582, 591, 594 (1974) (noting that expert testimony is not necessarily required to prove a product liability claim).

U-Haul chose not to address plaintiffs’ summary judgment arguments within the context of the applicable legal standard, relying instead on its expert’s citation to various coefficient of friction standards, which were irrelevant to the primarily

foreseeability-based “unreasonably safe” second prong of the *Restatement* test.¹ Thus, the unrefuted evidence of the foreseeability of the magnitude of risk, coupled with U-Haul's failure to address the safer different alternative designs advanced by plaintiffs, required a finding of design defect as a matter of law.²

Applying the summary judgment standard, a reasonable person would be compelled to conclude that any of the various slip-resistant features used by U-Haul's competitors on the edges of their trucks – and by U-Haul itself within inches of the threshold of its trucks – are safer than the bare metal edge of the U-Haul truck in this case. The inconsequential factual distinctions raised in U-Haul's brief notwithstanding, the courts in both *Johnson v. Salem Corp.*, 97 N.J. 78 (1984), and *Mettinger v. W.W. Lowensten, Inc.*, 292 N.J.Super. 293 (App.Div.1996), *aff'd sub. nom.*, *Mettinger v. Globe Slicing Mach. Co.*, 153 N.J. 371 (1998), affirmed

¹ The other factors cited in the *Comment*, such as “the likely effect of the alternative design on product costs,” “the range of consumer choice among products” and the “nature and strength of consumer expectations,” *Berkoski*, 480 N.J.Super. at 393, were also not addressed by U-Haul or its expert. To the extent they could be considered, they support plaintiffs’ position. For example, the number of safer alternative designs used by both U-Haul and its competitors confirm that production costs are minimal and that consumers would have an expectation of a non-slip surface at the edges of moving trucks.

² The testimony of U-Haul's employee, which was uncited below, that U-Haul examined competitors’ vehicles (Db15), does not change this fact. Indeed, the cited testimony establishes that U-Haul did not consider falls from vehicles, and instead apparently focused on unsubstantiated hand injuries. The testimony that there was “really no large advantage to it” – “coining” of edges (Pa220) -- concedes that there was at least some “advantage” to it, *i.e.*, that it was safer.

judgment as a matter of law –overruling jury verdicts – in similar circumstances where the defendants’ experts did not refute the foreseeability of injury and the safer alternative designs offered by the respective plaintiffs and their experts.

The different procedural postures of those cases are irrelevant because the “essence of the inquiry [in summary judgment motions and post-trial motions] is the same.” *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 537, 545 (1995) (holding that the summary judgment record “compel[led] the conclusion” that a broker’s conduct negligently and proximately caused plaintiffs’ damages as a matter of law). Ultimately, the question is, “could the product have been made safer by the adoption of a reasonable alternative design.” *Cavanaugh*, 164 N.J. at 6. Here, based on the summary judgment record, the answer is indisputably and resoundingly, “yes.”

POINT II

THE DEFENSES OF COMPARATIVE NEGLIGENCE AND PROXIMATE CAUSATION, WHICH WERE RAISED IN PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT BELOW, SHOULD HAVE BEEN STRICKEN

U-Haul falsely argues that plaintiffs’ motion for partial summary judgment as to liability did not address the issues of comparative negligence or proximate cause and are therefore not properly subject to appeal. (Db43-47.) U-Haul's attempt to undermine plaintiffs is a misguided effort to buttress its own credibility, and its attempt to spin the waiver issue is nothing short of unconscionable. It is U-Haul

that has “waived” the comparative negligence and proximate cause arguments – not plaintiffs. *Delray Holding, LLC v. Safe Design and Devel. of South Brunswick, LLC*, 439 N.J.Super. 502, 513 (App.Div.2015) (affirming summary judgment as to issue that went “unchallenged” by opponent); *Manual v. Berezinsky*, 478 N.J.Super. 299, 312-313 (App.Div.2012) (affirming summary judgment in favor of plaintiff on negligence claim based on lack of proper opposition to motion).

Plaintiffs fully presented argument on these issues, which U-Haul did not address in its opposition brief. The motion sought judgment declaring U-Haul liable, limiting trial to damages only, necessarily implicating comparative negligence and causation. Plaintiffs argued the issue, citing germane caselaw, to which U-Haul did not object. (Psa20.) The court denied that motion, from which plaintiffs properly appeal. On appeal, a “reviewing court” is “constrained . . . by the original [summary judgment] record.” *Lombardo v. Massi*, 207 N.J. 517, 536-37 (2011).³ To the extent the motion judge may have seen fit to erroneously deny the product liability aspect of the motion, he was bound by R.4:46-3 to grant the

³ Plaintiffs’ prophylactic reassertion of those arguments at trial, cited by U-Haul, does not obviate the fact that the motion court committed error when the argument was properly presented on their timely motion for summary judgment. It is illogical to impose strict timing limits on summary judgment and other motions that have dispositive effects if the motion court does not concomitantly conduct the required “searching review” of the record, improperly resulting in the imposition of the considerable costs of trial on both the judiciary and the litigants. *Brill*, 142 N.J. at 541.

unopposed aspects of the motion addressing comparative negligence and causation, requiring reversal.

To the extent the substance of this argument is subject to relitigation on appeal in light of U-Haul's waiver, there is not a shred of evidence even suggesting that plaintiff's unexceptional activity in loading the truck meets the high standard necessary to survivability of a comparative fault defense in a product liability action – "specific awareness of the danger posed by the defective product," *Lewis v. American Cyanamid Co.*, 294 N.J. Super. 53, 79 (App. Div. 1985), *aff'd as modified*, 155 N.J. 544 (1998) – *i.e.*, that the bed of U-Haul's truck could have been made safer through the use of slip-resistant features. Nor were those actions supportive of a proximate cause defense. The entire purpose of using slip-resistance on the threshold of cargo areas of trucks is to prevent people like plaintiff from slipping on them. *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 562 (1980). (*See*, Pb35-38.) U-Haul's argument to the contrary undermines the settled significant limitations on the use of an injured party's conduct as a defense in product liability claims.

The failure of the court below to remove consideration of these issues from trial specifically allowed U-Haul to improperly focus on plaintiffs' actions to serve as a distraction from the defect. Indeed, U-Haul's trial counsel improperly

capitalized on the ruling, tying plaintiffs' conduct into the defect issue in his summation:

Just because you slip on a wet metal surface on your 8th or 11th trip out of the truck, down out of my client's truck after safely navigating that same trip 10 times, that doesn't mean, suddenly, that truck is a defectively designed truck. Do you understand? Do you see what I'm saying? Now, you guys know that. How about some accountability, right, and some personal responsibility as opposed to blaming U-Haul for your accident? We talked about that a little bit in opening. [2T13-4 to -13.]

U-Haul's commingling, or "intertwining," of defect and comparative negligence epitomizes the type of error that is clearly capable of producing an unjust result, requiring reversal. *Ahn v. Kim*, 145 N.J. 423, 434-35 (1993), *citing*, *Kassick v. Milwaukee Elec. Tool Corp.*, 120 N.J. 130,136 (1990) (ordering new trial on product defects, misuse of product, and proximate cause because issues were interrelated). This renders U-Haul's argument that the "jury never reached the issue of comparative negligence" irrelevant. (Db44.) This error requires reversal of the entire judgment in favor of U-Haul independent of the defect issue.

POINT III

U-HAUL'S EXPERT OPINION WAS INADMISSIBLE

The Law Division should have granted plaintiffs' motion for summary judgment solely based on the unrefuted evidence of reasonable alternative designs that could have prevented a significant risk of harm. U-Haul's impertinent expert

opinion, which admitted foreseeability and did not dispute or address design alternatives, simply did not aid the trier of fact as to any relevant matter.

In its brief, U-Haul diverts from its expert's failure to render any opinions regarding the elements of the *Restatement* test. U-Haul first misrepresents that its expert "analyzes numerous industry standards and discusses which of the standards is applicable to the design of the U-Haul truck." (Db35.) Actually, the expert conceded that there "is currently no mandated number or value for minimum slip-resistance by any federal or state codes." (Pa417-419.) He also stated that none of the trade standards he cited was binding on U-Haul, and that it was "up to . . . U-Haul to determine what is slip-resistant." (Pa417.) His parroting of friction standards, none of which even remotely applied to delivery trucks exposed to the elements, was untethered to anything that could aid the fact finder, especially given his opinion that U-Haul was not subject to those "voluntary" and "non-mandatory" standards in any event.

In *Mettinger, supra*, 292 N.J. Super. at 311, the court, in ruling that a product should have been deemed defective as a matter of law, rejected the manufacturer's argument that a jury question was presented as to whether its product "was defectively designed" because no other manufacturer employed the preferred safety device. It held that "if there is an available, effective and inexpensive safety device which would reduce or eliminate a danger otherwise

posed by a product without adversely affecting the product's utility, the failure of all the manufacturers in an industry to introduce the device does not prevent their products from being defective and does not immunize any of them from liability.” *Cf., Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 398 (1982)(“[T]he existence of a duty to make a product safe ... ‘must be said to attach without regard to prevailing industry standards,’” and holding that “trade custom is not dispositive of compliance with” the duty to market a safe product.)

Here, the only evidence of an applicable standard was the plaintiff’s expert’s reference to the *de facto* industry standard created by U-Haul’s major competitors through their use of slip-resistant features on the metal edges of their cargo boxes – a standard that U-Haul’s expert did not refute, and with which U-Haul failed to comply. (Pa254.) His gratuitous references to concededly inapplicable standards, and effort to cut from whole cloth a U-Haul-created standard applicable only to U-Haul, were nothing more than distractions from U-Haul’s failure to follow the lead of its industry peers in adopting a safer design for their customers. The opinion was designed to confuse, rather than aid, the jury and should have been stricken.

In its brief, U-Haul also raises a “secondary hypothesis” of its expert, that plaintiff “overstepped,” rendering the defective design of the U-Haul truck “irrelevant” (Db47.) U-Haul also mentions that its expert focuses on plaintiff’s actions, citing to the existence of other “design features” such as “grab bars” and a

“ramp.” (Db35.) However, even a cursory review of those opinions in conjunction with the motion evidence confirms their inadmissibility.

As to “overstepping,” plaintiff testified that he was “stepping down” from the cargo area with his “right foot” onto the step bumper, with his left foot “on the edge of the bed,” when his “left foot slipped.” (Pa110-111.) U-Haul's expert's “secondary hypothesis” is premised on the mechanics of a person's body while walking down a staircase. (Pa422, figure 8.) Here, the plaintiff was at the level edge of the cargo area prior to stepping down to the step bumper, obviating the notion of an “overstep” as described in the report. Also, there is nothing in the record establishing the precise placement of plaintiff's foot, much less how far it might have extended over the nosing of the ledge for it to constitute an “overstep,” rendering this aspect of the report speculative and factually erroneous. More important, the potential for such “oversteps” is the precise reason that the edges of the steps should be slip-resistant.

As to the ramp, U-Haul's own truck designer testified that the ramp is not designed as the principal means of ingress and egress to the cargo area, and is for use when a heavy object is being moved with a hand truck or dolly. Instead, users are expected to use the “step bumper” and “steps.” (Pa216,218, T67-10 -14; 68-13 to -18, T73-17 to -20) (noting that the truck has a “good bumper to take your step . . . to make ingress and egress”). Even ramp users also had to cross the unprotected

threshold to access the ramp, which had no handrails and is located outside of the truck body. The ramp is no substitute for the use of slip-resistant material at the edge of the cargo area given the foreseeability of users exiting the truck via the steps.

Similarly, the “grab bars” are located on the rear of the cargo box and designed to enable users to pull themselves up into the cargo area. They are not visible from the inside of the truck for users who are exiting it. Nor are they ergonomically placed for users to step down. (Pa249, photo 2.) U-Haul's designer testified that it conducted “ergonomic studies” to determine the “height” of the step bumper in conjunction with “what the height of the handle should be for the average . . . person . . . to reach for that handrail *and make ingress into the vehicle*” – not to exit it. (Pa218, T75-8 to -15.)

Moreover, even if not using those features constitutes a misuse of the truck, that misuse is objectively foreseeable rendering those opinions legally irrelevant in any event. *Cepeda v. Cumberland Eng'g Co.*, 76 N.J. 152, 177 (1978) (“[I]n applying strict liability in tort for design defects manufacturers cannot escape liability on grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable.”) *See also, Jurado v. W. Gear Works*, 131 N.J. 375, 388 (1993)(“The very reason for declaring the design defective was to prevent

this kind of foreseeable misuse. Proximate cause could not, in such a case, present an obstacle on the grounds of misuse.”)

Thus, U-Haul's expert was in the same position as the expert whose testimony – as a matter of law – was found to be lacking as “to both its factual formulation and inherent reasoning” in *Johnson v. Salem*, 97 N.J. at 86, 91.

Ultimately, U-Haul's expert's conclusions were focused on “factor 5” of the old “risk-utility” analysis, *i.e.*, the “user's ability to avoid danger by the exercise of due care in the use of the product.” *Cepeda*, 76 N.J. at 174 (1998). His first conclusion, that U-Haul's design “enable[s] prudent users to accomplish loading and unloading in a safe manner,” essentially restates this element. (Pa427.) The remaining four conclusions focus on plaintiff's actions, not design, and relate to the “due care” aspect of factor 5 and/or to support inapplicable comparative negligence or proximate cause defenses. All of the expert's conclusions attempted to answer questions that no one was asking.

Despite U-Haul's argument in its brief, factor 5 of the “risk-utility analysis” is irrelevant to the *Restatement's* “reasonable alternative design” test, which applies to this case and which focuses on factor 3 of that test.⁴ As stated by the

⁴ “(3) The availability of a substitute product which would meet the same need and not be as unsafe.” *Cepeda*, 76 N.J. at 174 (1978). *Cf.* Judge Bariso's analysis of the issue in *Peterson v. AMSCO Engineering Services*, 2005 WL 1712924 at *2-*3. (Law Div. 2005) (Psa67.) (rejecting defendant's effort to shoehorn factor 5 into a safer alternative design claim.)

Supreme Court in *Cavanaugh, supra*, 164 N.J. at 8: “Although there are seven listed factors in the classical statement of the risk-utility analysis, . . . the prevalent view is that, unless one or more of the other factors might be relevant in a particular case, the issue upon which most claims will turn is the proof by plaintiff of a “reasonable alternative design ... the omission ... [of which] renders the product not reasonably safe.””

In this case, as in *Cavanaugh*, plaintiff did not argue “that the product's risks outweighed its utility.” Rather, “the plaintiffs’ theory was simple: that the [U-haul truck] ‘could have been designed in an alternative manner so as to minimize or eliminate the risk of harm.’” 331 N.J.Super. at 162. Factor 5 of the risk-utility analysis, which is the focus of U-Haul's expert opinion, was simply inapplicable and unhelpful to the disposition of the case.

U-Haul's expert’s conclusions were irrelevant to the legal underpinnings of the case and should not have been permitted.⁵

The orders under review should be reversed and the matter remanded for trial as to damages only.

⁵ The second through fifth conclusions of the expert report addressed “prudent use” through plaintiff’s actions, presumably to support the “due care” element of factor 5. This was improper. The focus is on the product when it left the manufacturer, not when the plaintiff was using it. *Johansen v. Makita, U.S.A.*, 179 N.J. 86, 101 (1992) (“Evidence of the plaintiff’s use of care . . . was irrelevant to the risk-utility analysis”).

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